UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 19 Cr. 374 (JMF)

MICHAEL AVENATTI,

Defendant.

Trial

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New York, N.Y.
February 1, 2022
9:00 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge
-and a Jury-

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: MATTHEW D. PODOLSKY
ROBERT B. SOBELMAN
ANDREW A. ROHRBACH
Assistant United States Attorneys

MICHAEL AVENATTI, Defendant *Pro Se*

DAVID E. PATTON
Federal Defenders of New York, Inc.
Attorney for Defendant
BY: ROBERT M. BAUM
ANDREW J. DALACK
TAMARA L. GIWA
Standby Assistant Federal Defenders

Also Present: Special Agent DeLeassa Penland
U.S. Attorney's Office
Christopher de Grandpre, Paralegal Specialist
Juliet Vicari, Paralegal

(Trial resumed; jury not present)

THE COURT: Good morning, everyone.

The government is here. Mr. Avenatti and standby counsel are here.

All right. Mr. Avenatti gave my staff a letter that I gather will be filed shortly on ECF regarding certain jury instruction issues. I don't want to get into that now since we'll have an opportunity later. It does point to an issue I just want to flag so that you can think about it in advance of the charge conference, where we will discuss this, which is, I think, depending on where I land on our discussion yesterday, I think we should think hard -- well, I don't think we'll all end up on the same page, but I want to make sure we have a discussion before closings about what Mr. Avenatti can and cannot argue in his closing so that he understands the line and I don't need to interrupt him and sustain objections if he crosses the line. But again, we'll defer that until later.

Mr. Avenatti, can you tell me what witnesses are here and what your defense case is going to entail?

MR. AVENATTI: Your Honor, at present, I do not have any witnesses here. Mr. Loupe was delayed due to a travel issue. He's supposed to land at Newark at 9:49 a.m. this morning.

THE COURT: All right.

MR. AVENATTI: Mr. Loupe is the witness who was under

subpoena here in New York, left New York and flew back to New Orleans despite our position that he needed to be here to testify. We immediately informed him that he needed to be in court this morning, back here in New York, and evidently, due to a travel issue, he's not able to get here until 9:49 a.m. He's on a flight right now into Newark.

THE COURT: OK. Mr. Karbley is not testifying?

MR. AVENATTI: No.

THE COURT: And Mr. Crain and Mr. Nicks are not testifying.

MR. AVENATTI: We were not able to serve them despite our efforts over the last month.

THE COURT: OK so that would be a no as well. Given my ruling last night, Mr. Marshack and Mr. Drum are not testifying.

All right. I think it might make sense to get Mr. Palma, Mr. Loupe's lawyer, on the phone to find out precisely what the nature and circumstances of what happened over the weekend were in order to determine whether we should wait for him or just proceed with the next phase of the case.

Mr. Avenatti, in the meantime, since it may have some bearing on it, what's your decision with respect to whether you intend to testify?

MR. AVENATTI: Your Honor, I do not intend on testifying because the government has not proven its case

against me.

THE COURT: All right. And I take it -- obviously, you don't have counsel; you have standby counsel, but you've thought long and hard about that decision and you began thinking about it as early as last week, and it is your decision not to testify. Is that correct?

MR. AVENATTI: For the reasons I've stated, yes, sir.

THE COURT: And government, obviously, if Mr. Loupe doesn't appear and there's no defense case beyond the stipulation, I assume there's no rebuttal case. Is that correct?

MR. ROHRBACH: That's correct, your Honor.

THE COURT: And if Mr. Loupe does appear, do you anticipate a rebuttal case?

MR. ROHRBACH: No, your Honor.

THE COURT: Do you have a view on how we should handle the Mr. Loupe situation?

MR. ROHRBACH: We defer to the Court; that is to say, we have no specific view on that.

THE COURT: All right. Give me one moment.

Counsel and Mr. Avenatti, bear with me. We're going to try and reach Mr. Palma. I would like to find out more about the circumstances surrounding this weekend before I make a decision on whether we're going to wait. Bear with me.

Actually, while we wait, I'd like to make a record

from Mr. Avenatti's perspective.

First, tell me what communication, if any, you had with either Mr. Palma or Mr. Loupe yesterday regarding his need to be here today to testify.

MR. AVENATTI: Your Honor, me personally, none. Advisory counsel handled the communications with Mr. Loupe's counsel as well as his travel arrangements.

THE COURT: OK. Is one of them in a position to speak to it?

MR. AVENATTI: Yes. Mr. Baum can speak to that, your Honor, if so permitted.

THE COURT: Go ahead.

MR. BAUM: Judge, I had text-message communications with Mr. Palma on Sunday. With the Court's permission, I can read some of those messages to you.

THE COURT: I don't know if there's something wrong with your microphone.

MR. BAUM: I'm sorry. I turned to face you, your Honor, and the microphone didn't capture everything I said.

THE COURT: Gotcha.

MR. BAUM: I said with the Court's permission, I can read some of those text messages to you.

THE COURT: Sure. I'd like to know, first of all, did you have any communication with Mr. Palma yesterday?

MR. BAUM: If I did, it's by text message. Let me

review my messages.

My recollection is that yesterday I told him that we would bring Mr. Loupe in as soon as possible.

THE COURT: At what time did you tell him that?

MR. BAUM: I think it's important to note before that that Mr. Palma told me in the text message on Sunday that he sent Loupe home and that I objected to that and told him that he had to be in court. So I think it's appropriate if we do this chronologically, Judge.

THE COURT: OK.

MR. BAUM: So here's a message from Sunday evening.

THE COURT: What time?

MR. BAUM: Let me get to it.

THE COURT: And I take it from the fact that you're text messaging him, that you have his cell phone number. Is that correct?

MR. BAUM: I do.

THE COURT: Great. Can I ask you to write that down on a piece of paper and give it to my deputy so that we can try and reach him.

MR. BAUM: Of course. Of course.

THE COURT: Oh, excuse me. I'm told that we actually have it.

MR. BAUM: OK.

THE COURT: So let's go back to the chronology.

MR. BAUM: OK. This is Sunday at 4:38 p.m. This is Mr. Palma texting me:

"Based on Judge Furman's ruling, I told Loupe he's free to leave New York City."

This is my response:

"He should stay because I did not see a final decision on the motion to quash the subpoena. Avenatti has to file something by 7 p.m. and then the judge will decide. Otherwise, he may have to return tomorrow."

THE COURT: And what time was your response?

MR. BAUM: It doesn't indicate the time, but it was immediately following his text to me at 4:38 p.m.

THE COURT: If you swipe left, it will probably tell you the time.

MR. BAUM: 5:33 was my response.

THE COURT: All right.

The advantages of having a new generation of counsel at Federal Defenders office.

MR. BAUM: You should only know, Judge.

THE COURT: All right.

MR. BAUM: Mr. Palma's response was:

"ECF 323 and 324 state Avenatti can't call. Recall my motion to quash is not to be considered. I sent it to the judge but did not file it as a motion."

Don't think -- and this is my response:

"Don't think that is correct. Judge said that Loupe can't testify on Monday until Avenatti files a response to a motion to preclude. Avenatti will file at 7 p.m. He may rule that Loupe can testify Tuesday."

And this is Mr. Palma's response:

"Based on ECF order 325, I told Loupe he was no longer needed to testify. I texted him at 4:35 p.m. after I got your text at 5:33 and 5:37. I immediately texted him at 5:37 and told him to stay. He replied at 6:47, saying he was on a plane headed back home."

And then the rest is about him returning as soon as possible.

THE COURT: OK. And then yesterday.

MR. BAUM: Yesterday, at 12:22 a.m. -- this is Sunday night, Monday morning:

"Loupe just called me. He's back in New Orleans. He's aware that he may have to return to SDNY Monday. I told him I'd be in touch with you for his plane ticket. Please send me the name and number of the person in your office who will coordinate his trip to New York City. Thanks. Richard."

My response, yesterday, at 6:26 a.m.:

"I will after the judge rules that he has to return."

Mr. Palma's response:

"OK. Thanks. Please let me know as soon as possible."

Then he made a comment about the defense, Judge, which I don't think is necessary. This is Mr. Palma's comment, not mine.

THE COURT: I don't need substantive commentary, just logistics.

MR. BAUM: OK. Then Mr. Palma said:

"Tell Judge Furman he ran out of money and could not stay."

And then I responded:

"Yes. May have to bring him early today."

And again, who should he contact? This is Mr. Palma:

"Who should he contact?"

And then he said: "BTW, I read the docket report after 10 p.m. I did not see this order."

And then he gave me his email address, and then he gave me a phone number. And then thereafter, we contacted him and I can tell you that we could not get a flight back to New York any time Monday.

THE COURT: I would like to know what time you contacted him to advise him that his client needed to be here.

MR. BAUM: At 11:50 a.m., I had the text from Mr. Palma:

"Hi, Bob. Any update? Richard."

I texted him back at 12:58 p.m.:

"The Court has not addressed it yet but will do so

within one hour."

This is yesterday before we discussed the witnesses.

"OK. Let me know. I got him on standby."

This is me texting him back:

"The Court just ruled he has to come. Can we contact him directly?"

THE COURT: What time?

MR. BAUM: 1:36 p.m.

Mr. Palma wrote:

"Yes. I'll let him know."

Then he wrote:

"I will give him a heads-up that you will call."

And I wrote back:

"Still in court."

And then he wrote back at 3:14 p.m.:

"At 2:55 p.m., I got a text from Sobelman asking to talk to Loupe at 5 p.m. I said he would be on a plane at that time. I then said I'd let him know the itinerary. Who should I talk to about his flight and hotel? Richard."

I wrote back:

"Still in court."

And then I wrote again:

"We are going to try and get him here on a flight. We can get him giving him reasonable notice before the flight. Both people who make the arrangements are here in court with

me."

He wrote back:

"I'm away from my phone for the next two hours, so communicate directly with Loupe. He's waiting for your call." Signed Richard.

My answer:

"OK. He'll get a call from Juliet Vicari or Anna Finkel."

He wrote back:

"I'll be away from my phone for the next two hours, so communicate directly with him."

I sent a message. And then there are no further texts.

After that we contacted him directly. We tried our best to make arrangements, and I was told that there are no flights available until this morning.

Judge, I would just add that I never released Mr. Loupe from the subpoena. My efforts -- in fact, I told him not to go back to New Orleans on Sunday. Mr. Palma advised him, misinterpreting what was happening on the docket sheet, to go back. We never told him to go back. I told him he would have to come back immediately on Monday, and we just couldn't get him a flight.

THE COURT: All right. Well, my understanding is Mr. Palma is on his way down to the courthouse now, so I prefer

that we wait at least until he gets here and I can find out his side of the story. It certainly does seem to me from your text exchange that he blatantly and egregiously misinterpreted my orders. I think as I made clear yesterday, I made no ruling over the weekend. Until I made a ruling he was subject to subpoena, and he absolutely should not have sent his client outside of New York. He should have been here waiting to testify, contingent on my ruling.

I really don't understand why when I took the bench yesterday and made clear that that was the state of play that you didn't immediately advise Mr. Palma that he had to get his client here yesterday so that if I ruled in your favor on this he would be here ready to go at 9 a.m. I certainly warned you before trial that if you didn't have a witness available, you'd be deemed to rest. I reiterated that yesterday, albeit maybe later in the day, and given that, I would have thought that you would have immediately sent him a message at 9 a.m., Get your client on a plane; he needs to be here ready to go tomorrow if the judge says he can testify.

But having said all that, we'll wait for Mr. Palma so I can get his side of the story, and in the meantime, perhaps we'll get a better read on where Mr. Loupe is.

Does anyone know what flight he's on?

MR. AVENATTI: One moment, your Honor, please?

Your Honor, I am informed that Mr. Loupe was booked on

flight No. 674, United Airlines, departing New Orleans at 6 a.m., arriving into, or scheduled to arrive into Newark originally at 9:49 a.m. I do not have a current flight status, but I believe we can probably look it up.

THE COURT: I looked it up. I'm pleased to say it's due to arrive early, at 9:38 a.m. So let's wait for Mr. Palma. In the meantime, perhaps Mr. Loupe will land and we'll get an update on his arrival time.

MR. BAUM: Judge, if I may add one fact?

I believe on Saturday or Friday, I advised Mr. Palma that Mr. Loupe should report to the courthouse yesterday at 1 p.m., which I estimated would be an appropriate time for him to testify and that Ms. Finkel of my office would meet him outside the courthouse and escort him to a location where he could wait until the time he could testify. That was either on Friday or Saturday.

THE COURT: OK. Thank you.

Give me a moment, please.

MR. AVENATTI: Your Honor, could I have a moment to chat with my advisory counsel?

THE COURT: You may.

MR. AVENATTI: Your Honor --

THE COURT: Yes.

MR. AVENATTI: -- I'm going to alleviate the problem by not calling him.

THE COURT: All right. Well, then -- all right.

Maybe I can connect with my deputy, who went down to tell the jury to just bear with us. We'll get the jury up, and I take it you'll rest in front of them. Is that correct?

MR. AVENATTI: Yes, your Honor.

I'm not aware of whether you wanted to address Mr. Marshack and Mr. Drum on the record before that or not, but I'd potentially like to be heard on that -- well, not potentially. I would like to be heard on that.

THE COURT: Well, you've already been heard in writing, so I'm not going to hear anything further. I've given you my bottom-line ruling and I'll give you my reasoning. Having said that, I'm going to get the jury up here and dismiss them first, since there's no reason to make them sit in the jury room and we may as well send them on their way.

While we do that, I will give you my ruling on GX-804, since they'll be here in a few minutes.

As I said last night, that motion is denied. The text of Rule 1006 doesn't require a preparer to be the witness who authenticates it. Mr. Avenatti cites no Second Circuit precedent requiring that a preparer must testify. He cites two cases from within the Second Circuit for the proposition that a summary "can be properly introduced through the testimony of a witness who supervised its preparation." *UPS Store, Inc. v. Hagan*, 2017 U.S. Dist. LEXIS 121352, at *5 (S.D.N.Y. Aug. 2,

2017); and also *John Wiley & Sons v. Book Dog Books*, 2018 U.S. Dist. LEXIS 229142, at *5, which simply quotes *UPS Store*, so really it's just one case. The fact that a chart, quote/unquote, can be introduced through the testimony of a witness who supervised its preparation doesn't mean that it must, and I would also note that "supervise" doesn't necessarily mean it's the preparer and doesn't preclude that multiple people are involved in the preparation.

As the case cited by Mr. Avenatti himself makes plain, to justify admission of a summary chart under the rule, the proponent must present "foundation testimony connecting it with the underlying evidence summarized" and showing that it is "based upon and fairly represents competent evidence already before the jury." *Fagiola v. National Gypsum Co.*, 906 F.2d 53, 57, (2d Cir. 1990). Mr. Medrano's testimony did precisely that. Put simply, there is no requirement in this circuit that the preparer be the witness who authenticates the chart. Instead, charts are routinely admitted through someone involved in the preparation of the chart and who is competent to testify, as Mr. Medrano did, that it fairly and accurately represents the underlying evidence. *See, e.g., United States v. Blackwood*, 366 F.App'x 207, 212 (2d Cir. 2010), affirming admission of a chart through a witness who was "personally involved in compiling the charts."

Mr. Medrano was personally involved in the preparation

of the charts. The fact that his role was lesser than Agent Penland's or someone else's is of no moment. And finally, of course, I gave a limiting instruction consistent with *United States v. Ho*, *United States v. Blackwood*, and *United States v. Miller*, making clear that what weight, if any, the jury gives is up to them, and it should be given only the weight that it deserves in light of the underlying evidence.

For those reasons, the motion was denied.

I'll make a record on the Marshack and Drum rulings when we have dismissed the jury, and at that time I will also give both sides a copy of the draft jury charge. It obviously was prepared prior to receiving Mr. Avenatti's submission of this morning, so I will consider that and decide what, if any, additions or changes should be made in light of that at the charge conference, but we'll go from there.

To make use of the time, since I'm waiting on the jury, let me speak to that, the charge conference. The proposed charge, as you will see, includes line numbers. It also includes annotations with respect to each charge. That's for the benefit of the charge conference. Those will all be removed from the final version, copies of which will be distributed to the jury to follow along when I instruct them. I just want you to be aware of what the basis for each charge is, and the line numbers will facilitate our discussion.

On that score, what we will do is I'll hear first from

the government with respect to any objections or suggestions. We'll go through in order from beginning to end. I expect you to cite a page and a line number or numbers. That's the point of the line numbers, so that there is no ambiguity or confusion what instruction or language you're referring to. And to the extent that you have an objection or suggestion, I expect that you will have a proposal for how to fix it. In other words, I don't just want you to raise problems; I want you to propose a solution if you think there's a problem. And then we'll do the same, starting with the beginning, with Mr. Avenatti's objections and suggestions.

Any questions about that?

MR. ROHRBACH: No, your Honor.

MR. AVENATTI: No, your Honor.

What is the time that you anticipate us doing the charge conference?

THE COURT: Let's see what time we get out of here. The jury's about to arrive, so we'll take that up when they're gone.

(Continued on next page)

(Jury present)

THE COURT: You may be seated.

All right. Good morning, ladies and gentlemen. Welcome back. Thank you for being here on time, and I appreciate your patience and apologize for the fact that we have kept you waiting this morning. We were taking care of a few matters that we needed to deal with before we brought you up.

With that, it is my understanding, Mr. Avenatti, that you intend to rest your case. Is that correct?

MR. AVENATTI: That is correct, your Honor.

The defense rests.

THE COURT: All right.

Ladies and gentlemen, you have now heard all of the evidence in the case, which is to say that there will be no more witnesses at trial, and the next phase of the case will be the closing arguments of the lawyers. We're not going to do that today, though.

Trial management is sort of more art than science. In the last day or two, last two days, I would say I have not been painting a masterpiece, which is to say that I take responsibility for the fact that we didn't get a full day in yesterday, and I take responsibility for the fact that I'm about to dismiss you and brought you in just to do that. So don't hold it against either side and certainly don't consider

it in your consideration of the evidence and your deliberations; that is to say, these things happen. I apologize. I take responsibility for it, but hopefully, you'll see it as a free day and be relieved rather than annoyed.

Be that as it may, we're not going to do anything further today because there are certain matters that we need to take care of before we proceed to closings, and rather than make you wait for an extended period of time in the jury room, I think it just makes more sense to send you on your way, and we'll start promptly tomorrow morning and get a full day in tomorrow.

On that score, let me say I've warned you a few times that I might extend the schedule when it comes time for closings and your deliberations, and I am going to say to do that, which is to say I'm going to ask you tomorrow to plan to be here past three, presumably until five, just to give us a little bit more flexibility with respect to closings, to make sure that we get those done and hopefully get to my instructions, and hopefully, you can begin your deliberations.

Again, tomorrow, please be here at the same time, no later than 8:30, 8:45, ready to go promptly. We might even bring you up earlier than we have throughout trial if we're ready to go. And in any event, we'll proceed with the summations and then hopefully my instructions and get you started on your deliberations.

My usual instructions apply. You have now heard all of the evidence in this case. That being said, you have not heard the parties' arguments about that evidence and the conclusions that you should draw from it. You also haven't heard my instructions about the law and the issues that you are to decide, and for those reasons, it is critical that you still keep an open mind. Relatedly, it is critical that you not discuss the case with each other or with anyone else -- with your employers, friends, etc. And as you know, please don't do any research about the case, google anything about the case, anything of that sort. And it's your obligation, since you remain jurors, to avoid any news or discussion about the case.

With that, and with my thanks for your understanding and patience with the fact that these are complicated matters and it's important to ensure a fair trial to both sides, to take care of certain things, you're dismissed for the day. We'll see you same time tomorrow morning and hopefully get a full day in.

And with that, I will wish you a wonderful day. Get home or to work safely. And thank you very much.

(Continued on next page)

(Jury not present)

THE COURT: You may be seated.

All right. Let me give you my rulings on Marshack and Drum, and then we'll discuss the charge conference and other matters.

First -- well, as noted, I denied the motion to compel. I granted the motion to quash. To the extent that Mr. Avenatti suggests or argues that the motions to quash should be denied as untimely, I disagree.

With respect to the Marshack subpoena, Mr. Marshack reasonably believed that he was relieved of his obligation to comply, given the bankruptcy court order on January 26. It wasn't until Sunday night that he learned about the motion to compel that Mr. Avenatti had filed, and he promptly moved to quash by the 3 p.m. deadline yesterday. If anything, Mr. Avenatti is to blame for any delay. His counsel was present in bankruptcy court on January 26 when the bankruptcy court ruled that Mr. Marshack could not comply with his subpoena as well as the government's subpoena, and it was incumbent upon him to pursue timely relief given that order. The bottom line is I exercised my discretion to treat the motion as timely.

The situation with respect to Mr. Drum is somewhat less compelling, but ultimately, given the circumstances, I think it would be unjust to deny an otherwise meritorious motion to comply based on timeliness. Counsel for Mr. Drum was

in touch with Mr. Avenatti's prior counsel and believed, whether correctly or not, that Mr. Avenatti had decided not to pursue the matter and not to call Mr. Drum or seek his evidence. Yes, counsel probably should have moved to quash when she didn't hear back from Mr. Avenatti, but I conclude that she reasonably believed that the matter had gone away and that there was no need to do so, particularly after January 24, the date of compliance, came and went.

Once again, therefore, I exercised my discretion to consider the motion. *See, e.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 52 (S.D.N.Y. 1996).

Turning to the merits, Mr. Marshack's motion is granted substantially for the reasons set forth in his motion at ECF No. 341. For starters, service probably wasn't proper since he was not personally served, but even if it was proper, compliance would be unreasonable and oppressive since it would be contrary to the order of the bankruptcy court. Mr. Marshack reasonably sought approval from the bankruptcy court when confronted with both sides' subpoenas. The bankruptcy court held that compliance would run afoul of the Barton doctrine -- I confess I hadn't heard of that doctrine until yesterday -- and prohibited him from complying.

That may or may not be correct. As I said, I heard of the doctrine for the first time yesterday myself. But to the extent Mr. Avenatti thought it was incorrect, as he argues in

his reply here, his remedy was to appeal the bankruptcy court order, not to disregard it or assume that Mr. Marshack could disregard it. Put simply, it would be unreasonable and oppressive to require Mr. Marshack to comply with the subpoena when doing so could subject him to contempt for violation of the bankruptcy court order. On top of that, in light of my ruling yesterday on *quantum meruit* -- namely, that Mr. Avenatti cannot argue to the jury that he was entitled to take Ms. Daniels's money because he was entitled, under *quantum meruit*, to a reasonable fee based on the quantity and quality of the work that he did, most, if not all, of the evidence that Mr. Marshack could provide is irrelevant. Any minimal probative value is substantially outweighed by various Rule 403 issues, including cumulativeness, confusion of issues, waste of time, and misleading to the jury.

Finally, to repeat something that I have said many times, to the extent that Mr. Avenatti sought to call Mr. Marshack in order to secure the contents of the Egan & Avenatti servers, he has them himself and has had them since September. In short, with respect to Mr. Marshack, the issue is not even close. His testimony and any evidence he has is almost certainly irrelevant, and to the extent it is relevant, there are major 403 issues, and enforcement of the subpoena would be unreasonable and oppressive.

As for Mr. Drum, his testimony has minimal relevance

and is largely, if not entirely, inadmissible. He analyzed records relating to a different criminal case for a different prosecution team involving different victims of different crimes and different financial transactions that have no connection or relationship to this case. As the charts attached to Mr. Avenatti's motion -- I think they were filed under seal, but nevertheless filed with his motion -- make clear, Mr. Drum engaged in an analysis of the defendant's and his firm's financial -- really, his firm's financial -- condition from 2011 to 2018. The period relevant to this case begins in the summer, perhaps spring, of 2018 through 2019. The financial condition prior to that period is, in my view, totally irrelevant, and to the extent that it has any relevance, any probative value of that evidence is substantially outweighed by the same 403 considerations that I referenced a moment ago.

Moreover, the subpoena, as written, is overly broad and thus requiring compliance -- for instance, its request for any and all communications of certain types -- would be unreasonable and oppressive, substantially for the reasons set forth in Mr. Drum's motion at ECF No. 342.

Finally, and not for nothing, to the extent that Mr. Drum's testimony would be admissible, it would have to have been on the ground that Mr. Drum is an expert witness, since he has no firsthand or percipient knowledge of anything relevant

to this case, and his analysis certainly requires technical and specialized expertise. Mr. Avenatti did not provide notice of his intent to offer such expert testimony pursuant to Rule 16(b)(1)(C), and even if he had, the testimony would fail the *Daubert* fit test given the facts at issue in this case.

The bottom line is the evidence has little or no relevance to this case. Any minimal probative value is substantially outweighed by 403 considerations, including waste of time, confusion of the issues, and misleading the jury, and compliance with the subpoena, as written, would be unreasonable and oppressive. And for those reasons, I denied the motion to compel and granted the motion to quash.

All right. I'll ask my clerk to print two copies of the charge. We will, not for nothing, also be docketing a copy just so it is on the public record, and for that reason, you'll have access to additional copies if you wish.

Again, just to stress, since Mr. Avenatti filed his --

Are you Mr. Palma?

MR. PALMA: Yes, your Honor.

THE COURT: All right. You are free to go. Mr. Avenatti has decided not to call your client, so thank you for coming down here. My apologies for any inconvenience, and have a good day.

Again, to get back to what I was saying, since I got his letter only this morning, I have not had a chance to read

it, let alone make any changes to the charge. So you should not construe the draft to mean that I have rejected or ruled on his proposals. We'll take them up at the charge conference along with any suggestions or objections, as we discussed shortly ago.

Let's talk about closings tomorrow.

First, who is going to be closing for the government?

MR. SOBELMAN: I will, your Honor.

THE COURT: And do you have an estimate on how long your closing is likely to be?

MR. SOBELMAN: Probably somewhere in the nature of an hour and a half.

THE COURT: All right.

Mr. Avenatti, do you have an estimate on the length of your closing?

MR. AVENATTI: Approximately two hours, your Honor.

THE COURT: All right. Let's just say that I don't expect either side to go over two hours, and hopefully, you can prepare accordingly.

The government will obviously have a rebuttal, and it's hard to predict how long that will be. Less is more. As I told Mr. Avenatti, don't be greedy. And I will not hesitate to cut you off if I think it's going on too long, but we'll take that as it comes.

As I said, at the charge conference, I do want to

discuss what the ground rules for the closings -- Mr. Avenatti's closing in particular -- are; that is to say, what arguments he can and can't make just so he has notice going in and we don't have to do that in front of jury. I think that would make abundant sense.

Other than the time of the charge conference, anything else that you want to raise or discuss?

MR. ROHRBACH: Nothing from the government.

THE COURT: Mr. Avenatti.

MR. AVENATTI: No, sir.

THE COURT: All right. It's 9:52. Why don't we reconvene at 1:00. Does that make sense? I assume you have nothing else you have planned at that time.

MR. PODOLSKY: That's fine for the government.

MR. AVENATTI: Yes, your Honor. Thank you.

THE COURT: Again, we'll provide you with one printed copy for each side any moment, and it will be docketed in short order so you can print as many copies as your heart desires.

I'll see you at 1:00, and we'll take it from there.

Thank you very much.

(Recess)

AFTERNOON SESSION

(1:20 p.m.)

THE COURT: Be seated. All right.

We are here for the charge conference. Sorry to start late, but as I think my staff told you, I decided to make some changes to the draft based on Mr. Avenatti's submissions both this morning and also about a half hour ago or hour ago with respect to my draft, so I thought it was more productive to give you those he proposed changes, the redlines, so that you could consider them and then we could discuss them now.

I am trying to think of the most productive way to do this. It seems to me that some of the issues, particularly the issues flagged in Mr. Avenatti's submissions, really go to the heart of what can and can't be argued here, and it might make sense to sort of start there before we discuss the particulars of the charge. But I am open to suggestions.

So let me start with the government.

MR. ROHRBACH: That's fine, your Honor.

THE COURT: All right.

Let me I guess give you my general reactions to Mr. Avenatti's submissions and where I think that leaves us and him.

First, with respect to his submission of earlier this morning, he makes four requests. I may as well just address them.

The first one I am not going to give that instruction. I do not think there is either a legal or a factual basis for it. I don't know what testimony he's referring to, but to the extent he's referring to her testimony that they had a later agreement that he not take any money with respect to the book contract, I don't even think there was an enforceable written contract on that point. So it misstates the law, and I don't think there is a factual basis for it either. But I will certainly hear from Mr. Avenatti if he thinks otherwise.

Let me jump to the fourth. Unless Mr. Avenatti can persuade me that my instruction on assessing the credibility of witnesses is legally incorrect, I am inclined to just leave my charge and disregard his.

Let me address the other -- so actually let me, sorry, I'm sort of thinking out loud here.

The second proposal is with respect to reasonable fee. As you probably saw, I have incorporated a portion of that into my proposed charge, namely, with a paragraph that does discuss the sort of factors that a court or arbitrator could consider in connection with a quantum meruit claim. Again, we will get to whether that should be included, what can and can't be argued in a moment, but I just want to underscore that I did make a change in response to Mr. Avenatti's proposal on that score.

The first part of the proposed instruction, namely,

that under the law and the terms of the fee agreement that Mr. Avenatti and his firms were entitled at all relevant times to a reasonable fee for all the services they provided Ms. Daniels is a misstatement of the law. I do not think it is accurate, and I am not going to include that.

I think I am not going to address the defense theory of the case for a moment because that's the sort of big item.

With respect to the two things that Mr. Avenatti addressed in his recent filing, his objections to my charge, I'm certainly inclined to -- but will hear from both sides -- to think that including the professional responsibilities professional duties instructions is well justified. I precluded the government from calling an expert on that, because it is my task to instruct the jury on relevant principles of law.

These are principles of law, not fact, and I do think they are relevant for the reasons that I think I made clear in the instructions, namely, that the jury could consider them in evaluating whether the government has proved the first two elements of wire fraud.

Having said that, and I think my initial proposal made adequately clear that the jury could not rely on an ethical violation without more to find that those first two elements were met, that is to say that an ethical violation does not necessarily mean that there is a criminal violation, but that

being said, in response to Mr. Avenatti's submission and his citation to *People v. Stein*, I decided to underscore the point by reiterating it at the close of the instruction on professional duties in the manner that you have before you.

So I thought it made sense to just leave no doubt about that and make sure that the jury adequately understands that an ethical violation does not necessarily mean -- or a lawyer can commit an ethical violation without having criminal intent.

I am happy to hear Mr. Avenatti's objections to the particulars of my charge. He adverts to thinking that they're wrong, but doesn't specify in what ways, so I am happy to hear those in due course, but that's my general view on including them all together.

Similarly, I am not persuaded by his objection to my proposed instructions on attorney's fees and costs. I will say I am not firmly wedded to including any instruction on this, and it may be that the result of our discussion here is that there shouldn't be any instruction. My concern is that there has already been argument -- or not argument but suggestion made in the opening about entitlement under the contract, this being a fee dispute, no reference to quantum meruit specifically, but sort of in the abstract.

A lot of questions of the witnesses have sort of gone to similar type things, so those issues are percolating.

They're in the air. I think it is my obligation to ensure that the jury is correctly instructed as to the relevant principles of law, and my concern is if they're left to believe, for instance, that that last sentence in paragraph 4 of the contract was an enforceable contract, then, you know, that is a mistaken impression, and they ought to understand what a contract is and what an agreement to agree is.

By the same token, I don't want them to be left with the misimpression that, you know, just because there are circumstances in which a lawyer can recover a reasonable fee for work that he or she did on behalf of a client, that that means that the lawyer can disregard his ethical obligations and misappropriate the client's money without telling the client.

So my concern is that it is almost inevitable that these issues are going to be injected -- in what way precisely is the issue we are going to discuss in a moment -- and that it is incumbent upon me to ensure that the jury has an accurate understanding of the background principles. So that's sort of where I was coming from in that regard.

I think that they are an accurate statement of California law, indeed including the law that Mr. Avenatti has cited in his various submissions to me on quantum meruit. If you look at the annotations, it cites some of the very same authorities, statutes, and cases. So I don't think that it is incorrect.

Let me say that to the extent that Mr. Avenatti says that either or both of these instructions -- you know, if he persuades me that they misstate the law, I will certainly revise them to make sure that they accurately state the law. But assuming that they accurately state the law and they're relevant and should be included, the fact that it leaves him with not much of a defense and, in his words, directs a verdict against him is neither here nor there. Sometimes if you have no legal defense, you have no legal defense. I am not going to allow him to make an argument that has no basis in the law or the record in this case. So the fact that that may strengthen the government's hand is not a problem if it's an accurate statement of the law and an accurate reflection of what's in the record in this case.

So that brings me to sort of the heart of the matter, which is what can Mr. Avenatti argue, given California law, given the state of the record in this case.

Let me try to articulate some principles here. I think some of these issues and some of these lines are nuanced and complicated, and in that sense I am very much not firm on this. I am just framing the discussion by sharing my current thinking. You, one or both sides, may persuade me to think about this differently.

Number one, I do not think that Mr. Avenatti can argue that he subjectively believed that he was entitled to take

Ms. Daniels' book money because he didn't testify, and as far as I can tell, there is absolutely no evidence in the record to support a jury inferring that he had that subjective belief.

I think that principle is all the more important to police since Mr. Avenatti is doing the closing himself. Needless to say, I will ensure that he does not treat the closing as an opportunity to testify before the jury without facing cross-examination. But, again, I don't think there is any evidence in the record with respect to Mr. Avenatti's subjectively believing the arguments that he has made to me and in that regard I don't think he should be permitted to argue that to the jury.

Second, I do not think that he can argue that it is a defense or that the jury must acquit if the jury concludes that he was legally entitled to the money or legally entitled to a reasonable fee and that the money he took was a reasonable fee. That is to say, I don't think he can make the argument that he was therefore entitled to the money and therefore could not have committed the crime.

It may well be that he would have had a valid legal claim in quantum meruit or for breach of contract, but as he conceded yesterday, there is no authority for the proposition that a lawyer with a claim to a client's proceeds can simply take a client's money for himself as opposed to bringing a claim in court or an arbitration, that is, in the absence of

Ms. Daniels' agreement or the absence of a judgment.

I do not believe that it is legally correct to say that the money he took was his property and therefore he didn't have an intent to deprive Ms. Daniels of her property. That is to say maybe he had some potential future entitlement to that money, but until it's reduced to judgment and she agrees to it, it is not his money; and it is fraud if he takes it and deprives her of the use of it for whatever time there is between that moment and his securing a judgment.

I think that is a deprivation of her property even if it is only a temporary entitlement to the money, and I think it's legally inaccurate to say that because he was entitled to a reasonable fee and/or that he was entitled to a reasonable fee that this was a reasonable fee and if the jury agrees then it must acquit. I think that is legally incorrect.

What I think he can do -- and, again, I want to emphasize that these are preliminary thoughts and nuanced issues, so I am thinking out loud here -- is argue something along the following lines: You will hear from Judge Furman that you can only convict if you find that the government has proved beyond a reasonable doubt that I had a fraudulent intent.

And let me underscore that obviously the government does bear the burden of proving his fraudulent intent and in that sense good faith is not an affirmative defense. It is the

government's burden to essentially disprove good faith.

You will also hear from Judge Furman that under California law a lawyer is entitled to a reasonable fee for work that he or she does on behalf of a client or may bring a claim for a reasonable fee for work that he she does for a client, something of that nature.

You heard evidence that I am a member of the California bar. The government has not proved beyond a reasonable doubt that I didn't believe that I was entitled to the money in light of that California law.

Obviously, the government can get up and say you are also going to hear Judge Furman tell you that under California law a lawyer can't simply take that money but has to bring a claim and what have you. But the fact that it is a weak argument doesn't mean that it isn't an argument he can make.

The nuance being I don't think he can argue that he had the subjective intent of -- you know, that he subjectively believed in good faith that he had this money, but I think he can say that the government hasn't carried its burden of proving that he had a fraudulent intent and rely on California law as an aspect of that argument.

That's sort of where I am at the moment.

Let me hear from the government.

MR. ROHRBACH: If we can have just a minute to discuss your Honor's --

THE COURT: Let me say -- sorry, one final point and then I will give you a minute. I think it is clear that if I'm correct in what I just said that Mr. Avenatti's proposed instruction regarding a defense theory of the case is legally and factually wrong, and therefore, he is not entitled to that instruction.

That being said, in order to accommodate his interest in a defense theory of the case instruction, I did propose one additional change which is reflected in the redline of page 20, which just sort of articulates succinctly, more succinctly than I did, the argument that I said he perhaps could make; namely, that, you know, the government has to prove that he had fraudulent intent and so forth and so on.

Now, why don't you talk amongst yourselves and I will hear from the government in a minute or two.

MR. ROHRBACH: Thank you.

THE COURT: Are we almost ready?

MR. ROHRBACH: We are almost ready, your Honor.

THE COURT: All right.

MR. ROHRBACH: I think we're ready, your Honor.

THE COURT: All right.

Mr. Avenatti, are you ready?

MR. AVENATTI: Yes, I'm ready.

THE COURT: The government?

MR. ROHRBACH: So we are in agreement with, beginning

with the question of what the defendant can argue, which we think is the sort of the principal guide, what instruction should be given. We are in agreement with the second and third of the Court's three principles.

The first one, about whether the defendant can argue about his subjective beliefs, we think Mr. Avenatti may be able to point to circumstantial evidence that he could then argue to the jury they can infer good faith from. So he might be able to point to the contract provision -- though it's unenforceable -- to say, you know, that evidence supports the notion that I was acting in good faith.

What he can't say are two things: One is, you know, I myself had that subjective belief, because that would be testifying, for which there's no evidence in the record. He also can't say that the law entitles me as a matter of contract or the principles of quantum meruit from the kinds of claims I could be able to bring to that fee.

We think those both run afoul of both the law and the second principle that the Court has articulated, but we are at least open, and I suspect Mr. Avenatti is about to argue that there is some evidence in the record to support a more affirmative good faith argument. In those sort of, in those narrow bounds, without reference to a legal entitlement of any kind or direct evidence of his intent, we think that argument may be available to him.

THE COURT: Okay.

Definitely scratching my head a bit at what that evidence might be. But certainly, to the extent there is any such evidence, I think he would be entitled to make the argument from that evidence, but not from, you know, certainly not argue that he had a subjective intent except to the extent it can be inferred from that evidence.

Okay. Anything else you wish to say on this? Or would that --

MR. PODOLSKY: Maybe turning to the instruction on attorney's fees and costs. Briefly, your Honor, honestly, let me just say first I think this is tricky. I am not -- hopefully in this discussion we can kind of reach the right resolution, but one proposal or concept we wanted to raise is -- and I'm looking at page 26 of the full version that you circulated and put on the docket -- the section begins with an introduction and a paragraph about sort of agreements to agree.

That language seems applicable and correct to make clear that the defendant can't try to point to the contract as a legal defense. I think once -- we start at line 18, and then you have added a paragraph, your Honor, about -- in the version you circulated just before the beginning of our conference about determining what constitutes a reasonable fee. Our concern about particularly the additional language, but perhaps all of it is why I raise it, is I don't want to confuse the

jury into believing that part of their job is to be the arbitrator, is to determine what a reasonable fee was. If it was reasonable for him to take $148,750, then that is a defense.

Particularly with the addition of "in determining what constitutes a reasonable fee," I worry that a juror will be confused that part of their job is to try to essentially be the judge of a contract dispute when that is really not the issue here. It's simply what the defendant's intent was.

THE COURT: I certainly agree with that as a general proposition. I guess my question is what you're proposing. Are you proposing I take it out altogether? Are you proposing the addition of language that says, to be clear, you know, your task is not to determine what fees, if any, Mr. Avenatti was entitled to, but I merely include this for you to consider in deciding whether he had the necessary intent to commit wire fraud? I mean, what's your suggestion?

MR. PODOLSKY: I think we're trying to work that through. But I think my initial thought, our first proposal would be not to include the new language "in determining what constitutes a reasonable fee." We think that invites the kind of quantum meruit argument, in fact if not in name, that the defendant shouldn't be able to make.

Second, if your Honor doesn't agree with that, I think our position would probably be to take out all of this after

the paragraph about agreement to agree simply to avoid the jury being confused.

I think that would also -- the defendant would be precluded from making arguments about, well, I could have brought an action and start talking about that. There's no evidence in the record about what the defendant believed as far as his legal rights and remedies. I think at most what he could say is look at the contract, the contract says you will be entitled to a reasonable percentage, and try to make inferences from that.

THE COURT: Okay, so just to be explicit about it, if I did that, I take it your position would be that Mr. Avenatti should be precluded from basically making any quantum meruit argument whatsoever, making no reference to the quality or quantity of the work he did, except to the extent that it may relate to that third sentence, which I am instructing the jury as to the principles of contract law. Is that your --

MR. PODOLSKY: It is, your Honor. I mean, I suppose he could try to make some inference, look there is a lot of evidence about how hard I worked, but I don't think he could suggest to the jury that there's some legal basis that that entitles him to any money. So I don't think he could make a quantum meruit type argument, whether he calls it quantum meruit or anything else.

THE COURT: My concern is, and I'm thinking out loud

here, my concern is that omitting that is misleading to the jury because Mr. Avenatti may be right that -- I mean, let me not beat around the bush. I think that last sentence of the fourth paragraph of the agreement is unenforceable. It is an agreement to agree. I don't see how in any action for breach of contract for that provision Mr. Avenatti could prevail. It seems to me quite clear.

Having said that, Mr. Avenatti may well be right that -- I mean, he did help. He may be right that under California law he could have after the termination of his relationship with Ms. Daniels brought a claim for quantum meruit saying I did a substantial amount of work on the book. The contract is not enforceable, but I have a claim in quantum meruit given the amount of time and energy and the work that I did to successfully bring the book about.

That may be true. I think it probably is true, but for the possibility that he disclaimed any interest, but that's a question for the jury to decide.

If that's the case, then it's not really accurate to leave the jury with a misimpression and say essentially -- I am not going to tell them that the contract is unenforceable, but to give them an instruction from which I think they could only reach that conclusion and leave them with the impression that, because of that, in essence they're finding he had no valid contract claim. Ergo he had no entitlement to the money, ergo

he must have committed a crime I think is not accurate. That would be my concern.

I guess, to connect it to your concession of a few minutes ago, to the extent that there is any evidence in the record from which he could argue the jury should infer good faith, I would think it is sort of dependent on them understanding that there may be circumstances in which a lawyer -- I don't know if you want to spell out what you think that evidence is or what you think the good faith argument would be, but it seems to me it is necessary to give the jury a complete picture of sort of, you know, how lawyers can obtain money and on what basis.

MR. PODOLSKY: On that last question I think our concern, and I think it was a very small one, is just not to prevent Mr. Avenatti from making any commentary about the contract language at all. We want to be careful about what he can say about what the evidence shows.

I think the daylight we were suggesting between what your Honor said and what we think he could say is very minimal. Just trying to pretend in a hypothetical world, where Mr. Avenatti wasn't representing himself, what his lawyer would say. Could he say affirmatively, the evidence shows my client had good faith. Read the contract. I think probably Mr. Baum or somebody else, Mr. Dalack or Ms. Giwa, could say something along those lines, even if it is not particularly persuasive to

us.

To go back, though, to the question I think your Honor -- or to focus on the language and your Honor's concern that maybe there's something misleading about the -- if we omit that there's the possibility of recovery, I suppose two comments.

One, we don't have to resolve this, but I think it's relevant to say -- I think it may be more complicated than he's a lawyer, he could recover the reasonable value. It is not even clear to me he was acting as a lawyer at that point.

I think our number one concern about the way that this section is drafted with the revision, that is, with the insertion about what constitutes a reasonable fee, is now we are into quantum meruit in substance if not in name, and suggesting to the jury that they may -- they should evaluate how much work he did and so on.

Whereas the preceding paragraph of that instruction says, in certain circumstances a lawyer may be able to recover the reasonable value of his or her legal services rendered to a client. I think that is sufficient for the jury to understand that in some circumstances the lawyer could seek the reasonable value of his services. They don't need to know, and I don't they should be told that what that means is a calculation of reasonable hourly rate, the nature of the work performed, its difficulty, the amount of work involved and the specifics that

are contained in the next paragraph. Because the jury doesn't need that information, and I'm concerned it will lead them into an inquiry that is not relevant to their job. It still may be useful to add the sort of cautioning language that your Honor suggested a few moments ago about what the true province of the jury is on these matters.

THE COURT: Okay. Putting aside the possibility of adding something about what they're being asked to decide and not asked to decide, your proposal is not to take out the sort of *sub silentio* reference to quantum meruit, but to take out the new paragraph that discusses the factors, just to avoid any possibility of confusion that their job is to evaluate those factors.

MR. PODOLSKY: I think, given our colloquy, that is what makes the most sense in this instance, yes.

THE COURT: All right.

Let me ask you to think about something while I turn to Mr. Avenatti. I will have more to say on summations in due course, but I am very, very concerned I think I intimated about policing Mr. Avenatti's closing and ensuring that he does not testify through his closing without subjecting himself to cross-examination.

I will be vigilant. I am not averse to sustaining objection even when an objection isn't made, and I trust that you will be vigilant and object when you think one is

warranted.

One small measure that I think might assist in that regard is I'm inclined to require Mr. Avenatti to refer to himself in the third person in the summation. I did not require that in his questions to the witnesses, but I feel like it might underscore the point that I will make to the jury, that what he says in his closing is not evidence and they should not consider it in that regard. I don't know if you want to speak to that now or later, but --

MR. PODOLSKY: Maybe we can give a little more thought to the particular proposal, but we agree that our number one concern in this closing is the following sentence: I believed, or I didn't think or I didn't -- etc., etc. I think you are exactly right, your Honor, that is when we would likely object. So perhaps your Honor's suggestion is a solution to that up front.

THE COURT: All right.

Mr. Avenatti?

MR. AVENATTI: Yes, your Honor. A few points.

Number one, I object to any requirement that I have to refer to myself in the third person now. I did not have to refer to my third person during the trial up to this point in time. It is prejudicial to now require me to refer to myself in the third person for closing argument.

Among other things, it reflects or could be seen as a

level of arrogance by the jury, which is certainly not --

THE COURT: Let me interrupt to make clear my proposal. I would explain to the jury beforehand that I am requiring you to refer to yourself in the third person, just to ensure that there's no ambiguity that you are making these arguments as a lawyer and therefore referring to yourself as the defendant rather than testifying. So I don't think there would be any concerns about arrogance, because I would make clear that I ordered you to do it that way.

MR. AVENATTI: Despite that instruction, your Honor, because there is such a connotation that goes along with referring to oneself in the third person, I still don't believe that that would cure the prejudice, your Honor, and I don't think it's necessary. That is number one.

Number two, if the Court was that concerned about it, I would be happy to allow Mr. Baum to give the closing argument if that would alleviate certain concerns that the Court and the government has relating to me testifying in my closing argument. I would be happy to permit that if the Court would permit it, and Mr. Baum is prepared to do it.

(Continued on next page)

THE COURT: All right. I will not. You waived your right to counsel, and I told you you couldn't proceed in a hybrid fashion. You don't have a lawyer anymore. So they may not speak on your behalf.

MR. AVENATTI: All right.

The other thing -- I want to be clear about this, your Honor -- is your Honor took the bench and your Honor made a number of comments about a lot of different things and then turned to the government. I just want to make sure, for the purposes of this charge conference, of course --

THE COURT: Can you slow down a little bit.

MR. AVENATTI: Sure.

I want to make sure, for the purposes of the charge conference, because it's so important and because, in my view, these issues are fraught with significant danger to the government and they proceed at their own risk, that we have a clean record as to each of these issues and each of my objections and each of my comments on the record. So let me turn, with that, if I could, to the following.

First of all, for the benefit of the record --

THE COURT: Slow, please.

MR. AVENATTI: For the benefit of the record, I reiterate and reaffirm my objections and requests as set forth in the filings at Dkt. 350 and 352. While some of the changes proposed by the Court in response to those filings may be a

step in the right direction, I do not believe that they adequately address the concerns and objections set forth in 350 and 352, nor do they cure the prejudice.

Now, turning to the issue of restricting my closing, as proposed by the Court, I object to each of those restrictions as highly prejudicial and interfering with my ability to mount a defense and exercise my rights under the Constitution and the Sixth Amendment.

Taking them in order, I object to the restriction proposed by the Court which would prevent me from arguing that, for instance, the contract provided adequate evidence to suggest or to instill a subjective belief that I could take the book money.

Furthermore, the Court made a statement on the record that seemed to suggest that every time there's a deposit into a trust account without the express approval of the client, you cannot take money out of the trust account. That is a complete misstatement of California law. It's just not accurate. When there's a deposit into the trust account, you don't have to get client approval every time you remove money or spend money out of the trust account.

Separate and apart from the law, Ms. Daniels testified under oath that I had the sole authority to spend any money out of the trust account without authorization from her, any further authorization. The government had an opportunity to

redirect. They declined to do so. So the testimony's in the record. I don't have the page number handy. I'd be happy to --

THE COURT: But Ms. Daniels is not instructing the jury on the law. To the extent that Ms. Daniels has an understanding of what you could or couldn't do with the trust accounts is not a relevant thing. We can discuss the particulars of my charge rather than some abstraction. If you think that there's something in the proposed charge that's inaccurate on that front, I'm certainly happy to entertain it, but I don't think there's any principle of California law that says that a lawyer can simply take money from the trust fund for his own fees without advising the client or where there's a dispute over those fees. In fact, I think California law is directly contrary to that. But I don't want to discuss this in the abstract -- I don't want to discuss that in the abstract. I'm happy to hear your specifics with respect to the professional duties discussed in the charge, but carry on.

MR. AVENATTI: The other statement I'd like to make for the benefit of the record is, your Honor, if that last sentence is found to be void or invalid as a matter of law, I believe that under California law it negates the entire contract, certainly as it relates to compensation, at which point under 6147 and 6148 and the law that I've cited, the attorney is entitled to a reasonable fee. So I'm perplexed as

to how we're proceeding as if that one sentence is excised, which results in me not being able to argue, according to the Court, to the jury that that contract entitled me to a fee from the book at the same time the Court is precluding me from arguing that I was entitled to a reasonable fee. I don't understand.

THE COURT: Because there's a difference between saying I have a valid claim to a fee, that if I had filed it in court or brought in arbitration I might have been able to obtain a portion of the book advance that she received as payment for my services and saying that I could simply steal that money from her without even telling her and indeed with lying to her. Those are two very different principles, and I asked you directly yesterday, do you have any authority for the proposition that under California law, where you have a subjective belief -- and I'm going to assume for the sake of argument, and there's nothing in the record that I think really supports this -- assume for the sake of argument that it was your subjective belief that you were entitled to a portion of her book fees because, under *quantum meruit*, I asked you to cite me anything in California law that entitled you to simply take it without telling her, and you could not cite anything. And I think that in that regard my instruction is an accurate statement of California law. It actually does, contrary to the government's desires, include an instruction about the idea of

quantum meruit so they understand that there is such an idea under California law.

What it doesn't do is tell them that if you have a valid *quantum meruit* claim you can simply take the money for your own. You can't. I'm certainly still open to your bringing authority to my attention that suggests you can, but in the absence of that authority and given the authority that I cited elsewhere in the charge, it would be misleading and wrong to suggest to this jury that because you might have believed that you had an entitlement to a portion of her book fees pursuant to *quantum meruit* -- and I want to be clear, I don't expect to hear those words in front of the jury -- that you were entitled to simply take the money. That is wrong. Inaccurate. Baseless.

So I have ample authority to preclude you from making an argument to this jury that misstates the law and has no basis in the record, and I intend to exercise that authority and ensure that you do not. I would do that if Mr. Baum were making the closing arguments, and I will certainly do that if you are because I think the necessity of ensuring that the jury does not misunderstand and think that you're providing testimony is absolutely paramount.

MR. AVENATTI: Understood, your Honor.

For the record, you stated earlier that that was a conceded point by me. It is not conceded by me. I do not

think that that is --

THE COURT: I don't think I said it was a conceded point. I said you conceded that you didn't have any authority to support the point. That was a conceded point.

MR. AVENATTI: Yes, as of yesterday. Correct.

THE COURT: I'm going to ask you again. Do you have any authority for the proposition that where a lawyer has a potentially valid *quantum meruit* claim that could be filed in court or brought in arbitration, that instead of bringing it in court or in arbitration, you can simply take that money for yourself, let alone lie to your client to take it? Do you have any authority?

MR. AVENATTI: Your Honor, I don't have any authority as I sit here today, but what I do know is that if the client has agreed to pay costs, by contract, you are certainly entitled to be reimbursed your costs upon receipt.

THE COURT: And the provision that you're relying on, which I think is unenforceable, does not include any reference to costs. Once again, you're shifting ground. You're now talking about the second clause, which relates to the CrowdJustice fund, not to the book advances.

MR. AVENATTI: No. I'm talking about --

THE COURT: You're not going to confuse me, and Mr. Avenatti, I am going to do everything in my power to ensure that you don't confuse the jury, because I want the jury to

understand what the issues are in this case, what the law is in this case, and make a decision about whether you committed a crime and whether the government has proved beyond a reasonable doubt that you committed the charged crime. You can make any valid argument you want, and I'm not going to prevent you from doing so, but you cannot invoke the Sixth Amendment of the Constitution to say that you were entitled to make a defense that is baseless as a matter of law or baseless as a matter of the record. There is no authority that allows you to do that.

MR. AVENATTI: Your Honor, paragraph 3 of the contract expressly states that she agrees to pay costs. It's in paragraph 3 of the contract. Period. The government wants to ignore paragraph 3. I'm not going to ignore paragraph 3 of the contract. So paragraph 3 expressly provides that the client, Ms. Daniels, is to pay costs. On time. So to prevent me from arguing that I was entitled to take the money and apply it to costs is error.

THE COURT: OK. What else do you want to say?

MR. AVENATTI: Well, at this point --

THE COURT: Actually, it also says to pay bills for reasonably incurred costs on time.

Did you send her a bill for that money?

MR. AVENATTI: Your Honor, I'm entitled to make --

THE COURT: Is there any evidence in the record that you sent her a bill for that money?

MR. AVENATTI: Your Honor, I believe I'm entitled to --

THE COURT: Yes or no.

MR. AVENATTI: Your Honor, that's the government's argument.

THE COURT: I don't know what the government's argument is or not. I asked you a question. Is there any evidence in the record that you sent her a bill for the money that you took from the book advance?

MR. AVENATTI: Well, your Honor, it depends on how you define bill, but I think there is some evidence in the record on that.

THE COURT: All right. I will await your argument to see what that is. Do you want to proceed with the other principles that I've tried to articulate?

The government conceded, by the way, that there may be evidence from which you could argue or infer good faith. Do you disagree with the proposition that you should not be permitted to say that you had subjectively a belief that you were entitled to the money?

MR. AVENATTI: Do I disagree with that restriction on my closing?

THE COURT: Yes.

MR. AVENATTI: Yes, I disagree with that restriction on my closing, because I should be able to point to the fee

contract, the course of dealing with Ms. Daniels, the amount of work that was involved, the costs that were expended, all of which would support a subjective belief as well as an objective belief and an inference that I was entitled to the money.

THE COURT: OK. Well, objective, you're wrong for the reasons we've discussed.

Subjective, I think it may be, as the government seems to acknowledge, that you can point to those things and say that the jury could infer from those things that Mr. Avenatti had a subjective belief that he was entitled to treat this money as his own. But I don't think that you can get -- let me put it differently.

You're not going to get up and say Michael Avenatti or I, whatever the case may be, subjectively believed that I was entitled to this money. You didn't testify. There is no direct evidence in the record regarding your subjective belief. I will allow you, if you clearly articulate that you are urging the jury to draw inferences from evidence that is in the record, to draw the inference that you had a subjective belief. The that is one thing, but I will absolutely police the line and prevent you from saying anything that suggests that you had that subjective belief in a way that suggests that -- in the way that you could have done if you testified. OK?

MR. AVENATTI: Fine. Understood, your Honor.

Just for the benefit of the record, also, I want to

state that the government brought out evidence that Ms. Daniels had a conversation with me about the fee that I would receive for the book contract. I should be permitted to ask the jury to draw reasonable inferences from that conversation, for example, that she believed that there was a fee for the work performed due.

THE COURT: It would be helpful if you cited a transcript page, but be that as it may, I think I've articulated the line there. And proceed as you would and with caution, understanding that there is a line between saying I subjectively believed this and there is evidence from which you can infer that I subjectively believed this.

The second proposition, as I said, was that you cannot make the argument that they must acquit if they find that you were entitled, under the contract or otherwise, to a reasonable fee and that the amount of money that you allegedly took was a reasonable fee, because that is a misstatement of the law.

Do you disagree with that proposition?

MR. AVENATTI: Yes, I do, your Honor, because I believe that it negates the good faith defense. It effectively operates to render the good faith defense null and void, illusory.

THE COURT: We just discussed the good faith defense. The good faith defense turns on your subjective intent, and for the reasons that we just discussed, I will allow you to make an

argument that you can infer from the record, evidence in the record, that you believed that you were entitled to take the money or that the money was yours. That is different from arguing that if the jury finds that you had a legal entitlement to the money, you can't be convicted because it was not Ms. Daniels's property or money. That's the second point, the objective point, not the subjective point.

MR. AVENATTI: Your Honor, now I'm confused, and I want to clarify because I don't want any problems tomorrow.

The Court is not permitting me to state that I believed that I had an entitlement to the money because of the contract. Am I correct about that?

THE COURT: I'm not going to permit you to say that you believed anything. I'm going to permit you to say that the jury can infer -- I'm going to permit you to say one of two things. One is the government hasn't proved that you didn't believe that you had an entitlement to the money. I certainly think that it is the government's burden to do that, and you can certainly rely on the burden and argue that the government didn't carry its burden.

MR. AVENATTI: I can argue --

THE COURT: In part, based on the government's concession, I will permit you to argue that you can infer from this evidence in the record or that evidence in the record that I had good faith in taking the money because I did a bunch of

work, and as it says in the contract, I would be entitled to a reasonable percentage to be agreed upon, etc., etc., and that you can infer from that that I have good faith.

This conversation is underscoring to me why I should require you to refer to yourself in the third person, but we'll bracket that for the moment.

What I will not let you do is stand up and say I believe I had entitlement to this money, ergo, you can't convict me, because that is allowing you to testify, through your closing, without subjecting yourself to cross-examination. Do you understand?

MR. AVENATTI: I think I do. I hope I do.

THE COURT: OK. Let me turn back to the second proposition, which, again, doesn't turn on your subjective belief or intent but is a statement that because you were entitled, that you had a legal entitlement or a legal claim to the money as a reasonable fee, if they agree with that proposition, that they cannot convict you. I think that is a misstatement of the law, and you should not be permitted to make that argument.

Do you disagree?

MR. AVENATTI: I do disagree for the reasons previously stated on the record.

THE COURT: Can you reiterate those, because I don't know what they are.

MR. AVENATTI: Because as I previously stated, your Honor, if I was entitled to the money, whether it be fees or costs, if there was an entitlement to the money, I don't believe I can then have the requisite intent -- for the reasons, again, that I've previously stated -- necessary to convict me.

THE COURT: No. You would have to subjectively believe that you were entitled to simply take the money for your own, and there's certainly no evidence to support that in the record.

MR. AVENATTI: But the Court --

THE COURT: But again, I'm not precluding you from making an argument, within bounds, as long as you don't cross the line and testify. I'm not precluding you from making an argument about your good faith and subjective intent. What I am saying here is that you cannot make the argument that this was a reasonable fee, that the law entitled you to a reasonable fee, and ergo, this wasn't even Ms. Daniels's property, so you couldn't be convicted of wire fraud because not only was there no intent but there was no deprivation of her property at all. That is a misstatement of the law.

MR. AVENATTI: And I disagree. I don't think that is a misstatement of the law, your Honor, and for that reason, that's why I'm objecting to the Court curtailing that argument in my closing argument.

THE COURT: All right.

Mr. Podolsky, do you think I have misstated the law on that? Anything you want to add on that?

MR. PODOLSKY: No, your Honor. I think you're absolutely accurate on that, and it's not a proper argument to the jury to say that if you find now that the fee is reasonable I can't be convicted of the crime. I think that should be precluded.

THE COURT: All right. I agree, and I'm prepared to sustain any objection to that argument. Mr. Avenatti, you've preserved your objection, but you should be forewarned not to cross that line.

My third proposition, I think, we have adequately covered. Again, I think it's quite clear that the government -- Mr. Avenatti can argue that if the government hasn't proved that he didn't have good faith -- that is, the government hasn't proved bad faith, because there are all these reasons to think that a reasonable lawyer or that Mr. Avenatti might have thought that he could take this money. But only if it's actually in the record and inferable from what's in the record.

All right. Anything else you want to discuss in the sort of general proposition portion of the discussion? Then we can talk about your particular objections and turn to the charge itself.

MR. AVENATTI: There was one other item I wanted to raise, your Honor. You had discussed the "theory of the case" proposed instruction. I don't know if you want to talk about it now or if you want to wait until --

THE COURT: Well, let's walk through your two letters and then each item there, and then we'll turn to the charge itself.

I already gave you my inclinations. Let's talk about 350, the letter that you filed early this morning.

You requested an instruction regarding the contract. As I indicated, I think it is wrong as a matter of both fact and law. Do you wish to be heard on that?

MR. AVENATTI: Beyond what I've already said on the record and submitted in the letter, which I reiterate, no, your Honor.

THE COURT: OK. So I will not include that instruction.

Do you wish to be heard as to the beginning of the second proposed instruction regarding a reasonable fee? For now, I have included some language along the lines of the second portion, but do you wish to be heard further on the first line?

MR. AVENATTI: Again, just for the benefit of the record, I reiterate the request, and I'll address the Court's proposed language at the appropriate time in the charge, if

that's acceptable to your Honor.

THE COURT: That is acceptable.

Let's switch to the instruction regarding "interest in the outcome."

As I said, I'm inclined to use my standard charge on witness credibility. If you can tell me why it would be incorrect or doesn't adequately do the job, I'm open to your suggestions, but otherwise, I'll leave it there.

MR. AVENATTI: Well, I believe, your Honor, I cited to *United States v. Gaines*, 457 F.3d 238 at 240.

THE COURT: I see the citation, and I'm familiar with *Gaines*, but tell me what is wrong in my instruction.

MR. AVENATTI: Well, I think that this instruction is a more robust, full, and complete instruction, your Honor, addressing the potential bias, etc., of a witness, especially due to interest in the outcome. So this is the instruction that I'm requesting.

My understanding is that's the Second Circuit recommended instruction.

THE COURT: Actually, *Gaines* involved the testimony of a defendant and argued that the standard instruction given until then with respect to a defendant's testimony was error and they should just give the same charge with respect to all witnesses, including the defendant. So you're wrong, but be that as it may, on page 10, lines 3 to 4, I include precisely

the proposition that you would like me to include, so I won't make any changes in response to that.

With respect to the defense theory of the case, I think we've adequately covered that. For reasons that I've made clear, I think the proposed instruction by Mr. Avenatti is wrong both as a matter of law and as a matter of record and what arguments can be made. I have made a more limited proposed change to accommodate his request for a defense theory instruction, and we'll take that up when we turn to my proposed charge.

All right. I think, Mr. Avenatti, you've been adequately heard on the "professional duties" instruction and on the "fees and costs" instruction writ large. So I think I'll entertain any specific objections with respect to those, but I think we've otherwise covered your objections in Dkt. No. 352.

Given that, let's turn to the actual draft. And why don't you assume that it is as modified by the redline so we'll have to switch back and forth in terms of page and line number.

But let me start with the government, if you can go through from beginning to end citing me by page and then line and then whatever your suggestion or objection is.

MR. ROHRBACH: Yes, your Honor.

We only have a few suggestions. First is on page 3, line 11. We certainly agree with the proposition that the

conduct of counsel and Mr. Avenatti in his capacity as counsel are irrelevant to this case. But the proposed instruction suggests that Mr. Avenatti's conduct in general is not in any way at issue.

THE COURT: Let me stop you. I struggled over this a little bit because of precisely the point that I think you're getting at. Obviously his conduct is very much at issue in this case, and my intention was not to suggest otherwise in the instruction. So I'm open to there being a better way. How about "personalities and the conduct of both counsel and Mr. Avenatti," or "to the extent that he acted as his own counsel in this case"?

MR. ROHRBACH: That would be fine, your Honor. Our proposal was in this courtroom, or something along those lines.

MR. AVENATTI: The defendant prefers the suggestion by the government and objects to any additional reference to the fact that the defendant is representing himself.

THE COURT: All right. I like your use of the third person there, Mr. Avenatti.

How about "personalities and the conduct of both counsel and Mr. Avenatti, in this courtroom, are not in any way at issue"?

MR. AVENATTI: Or "during the trial."

THE COURT: Maybe that's even better.

MR. ROHRBACH: That's fine, your Honor. And we would

ask for the same change, just for clarity, on line 13. It's the next sentence and has similarly broad language.

THE COURT: All right. What I would propose is adding the words "during this trial" but after conduct: "The personalities and the conduct during this trial of both counsel and Mr. Avenatti are not in any way at issue. If you formed opinions of any kind about the personalities or conduct during this trial of any of the lawyers in the case or of Mr. Avenatti," etc., etc.

MR. ROHRBACH: Thank you, your Honor.

THE COURT: Mr. Avenatti.

MR. AVENATTI: No objection.

THE COURT: Very good.

Next.

MR. ROHRBACH: The government's next (inaudible) is on page 4, line 9. The "presumption of innocence and burden of proof instruction" is accurate to the government's understanding, but at the end of it, where it says he carries the presumption with him "during the course of your deliberations in the jury room," the government would propose adding "unless and until you determine that the government has proven its case beyond a reasonable doubt," at which point the presumption is overcome and no longer obtains.

MR. AVENATTI: Your Honor, I object to the change. It's self-evident.

THE COURT: All right. I will make the following change: "Unless and until the government proves beyond a reasonable doubt that he committed one of the charged crimes."

MR. ROHRBACH: Thank you.

THE COURT: Next.

MR. ROHRBACH: Our last proposed change actually arises in two places. The first is page 20, line 13.

THE COURT: OK.

MR. ROHRBACH: They are both places in which the proposed instruction, the phrase that if the defendant in good faith believed he was entitled to the money or property, and in our view, it's more accurate to say that he needs to believe he was entitled to take the money or property. So we would propose adding the word "take."

THE COURT: Sorry. When you say page 20, line 13, that's in the redline.

MR. ROHRBACH: That's in the redline, yes, your Honor.

In the Court's proposed, at the bottom of that paragraph, it uses that same phraseology, on line 18, so we would propose using that throughout, and we've noticed two places.

THE COURT: This is in the redline, the few pages I gave you earlier, page 20, line 13.

MR. ROHRBACH: It says "good faith belief that he was entitled to," and we would add the word "take" there.

THE COURT: OK. And where does it appear elsewhere?

MR. ROHRBACH: The other is not on the redline, page 21, line 1. Actually, that may even be the same location, just in the non-redline version.

THE COURT: I think it is.

MR. ROHRBACH: Those are the government's only suggestions to the charge, your Honor.

THE COURT: All right.

Mr. Avenatti.

MR. AVENATTI: Yes. Let me address those two, your Honor.

THE COURT: It's just one, turning back.

MR. AVENATTI: OK. Turning back to 20, line 13, the government's proposal to add the word "take" behind "that he was entitled to," and then "take the money or property," it then says "that he deprived the victim of." So it's duplicative. It should either be "take" or "deprived the victim of." There's no need to reinforce the concept twice in that sentence, and I prefer "take."

MR. ROHRBACH: Well, your Honor, the phrase at the end is a description of the money or property, and the point of the word "take" is to distinguish between the act of taking the property and the fact that he may have had a legal entitlement, in his view, to the property. So the phrases serve different purposes in the sentence.

THE COURT: All right. What if we just said "entitled to take the money or property from the victim"?

MR. ROHRBACH: That would be fine, your Honor.

THE COURT: I take it that's your suggestion, Mr. Avenatti.

MR. AVENATTI: Yes, sir.

THE COURT: That avoids a dangling participle, so all the better as far as I'm concerned.

All right. Nothing else from the government?

MR. PODOLSKY: One other suggestion, which is for the purpose of efficiency, on page 36. This is in the instruction on "right to see exhibits and hear testimony."

THE COURT: Yes.

MR. PODOLSKY: I wondered if, after line 17, we might consider a sentence to the effect of "it will be more efficient, should you want any testimony, to ask for the testimony of particular witnesses rather than particular topics."

The reason I'm mentioning that is, in my experience, when the jury comes back and says I want all the testimony on X, we spend hours, if not days, trying to figure out what that means.

THE COURT: Mr. Avenatti.

MR. AVENATTI: So, just so I understand and we have a clean record, what is the exact language being proposed?

MR. PODOLSKY: My sentence, although I'm not married to the precise wording, was "it would be more efficient, should you want any testimony, if you ask for the testimony of particular witnesses rather than particular topics."

MR. AVENATTI: So, I object because it seems to suggest to the jury that they can't ask for particular topics and have to ask only for specific witness testimony. I think it should be left the way it is.

THE COURT: All right. I'll leave it as is.

I don't disagree with you, Mr. Podolsky, that that can be time-consuming and frustrating, but that's the point I'm underscoring to them, that they should be as precise as possible, and beyond that and telling them that it may be time-consuming, I think we shouldn't put our thumb on the scales of what they might request. So I'll decline the otherwise helpful suggestion.

MR. PODOLSKY: Trying to save everyone a lot of pain, that's all, but I understand, your Honor.

THE COURT: I take it no objections to the verdict form as proposed.

MR. PODOLSKY: No, your Honor.

THE COURT: So the record is clear, I will be docketing the additional redline pages, by the way, just so that they're part of the record and the record is clear. But any objections to the proposed redline changes that I gave you

just before this?

MR. ROHRBACH: The only one is the one before we discussed on page 27, the description of the *quantum meruit* factors.

THE COURT: And your suggestion or proposal would just be to delete paragraph 1, 8 through 15?

MR. ROHRBACH: Yes, your Honor.

THE COURT: All right. I will ponder that. In the meantime, why don't you ponder whether there's an alternative or additional approach of adding some language in here that makes clear that their task is not to decide what a reasonable fee would be or whether it was reasonable but, rather, whether Mr. Avenatti committed wire fraud. I'm not suggesting that's the right language. I'm just adverting to the proposition.

All right. Mr. Avenatti, let's go through it in order as well.

MR. AVENATTI: Do you want me to address that last point first, your Honor?

THE COURT: No, because it's not yet ripe. So going through the charge as proposed, let's start with the clean version. Any objections or suggestions there? Obviously, you should keep in mind the proposed amendments that I've made and, in that sense, don't need to lodge an objection to something that I've proposed to change already.

So go ahead. Page and line number.

MR. AVENATTI: Yes, your Honor.

Page 2, line 21 through line 4 on page 3. Well, actually, let me be a little more finite.

Page 2, line 22 to line 23, I do not want the jury reminded that I was represented by a lawyer when the trial began. It's unnecessary. I believe the instruction should start with a sentence that basically states, "as I previously advised you" --

THE COURT: How about I just strike the entire first sentence of that instruction and simply say "a criminal defendant has a constitutional right under the Sixth Amendment," etc., and go from there.

MR. AVENATTI: I would prefer to state, "Mr. Avenatti has a constitutional right under the Sixth Amendment to the United States Constitution to represent himself."

THE COURT: All right. I'm not going to do that. I'll do what I proposed, but I think your other point is well-taken. There's no reason to remind them that you exercised that right in the middle of trial.

Next.

MR. AVENATTI: Page 3, line 17. Before the word "evidence," I would propose the words "testimony and" -- or "testimony or," I should say. So it would read "objection to any testimony or evidence."

THE COURT: Fine.

Next.

MR. AVENATTI: Same change on line 18.

Same change on 19.

THE COURT: All right. I do explain elsewhere that testimony is evidence, but regardless, I'm happy to make those changes.

Next.

MR. AVENATTI: Page 5, line 3 through 7. With the exception of the words "on the other hand," I'm requesting that that paragraph be moved above the paragraph beginning on page 4, line 21, and the reason is because of the presumption of innocence, your Honor.

THE COURT: In other words, you want the "not guilty" paragraph to precede the "guilty" paragraph.

MR. AVENATTI: Yes.

THE COURT: Any objection from the government?

MR. ROHRBACH: No objection, your Honor.

THE COURT: All right.

Next.

MR. AVENATTI: Page 8.

Your Honor, one other change on page 4 -- I'm sorry -- line 16.

THE COURT: Yes.

MR. AVENATTI: After "or the lack of evidence," I'm requesting that the words "and inconsistencies in the evidence"

be added.

THE COURT: No, I will not do that.

Next.

MR. AVENATTI: And on page 4, line 20, I'm asking for the words "not all possible doubt" to be deleted.

THE COURT: All right. Next. I'm not going to do that.

Next.

MR. AVENATTI: Page 8, lines 13 through 17, I'm asking that this paragraph be eliminated, your Honor. This instruction has been given a number of times to the jury. At this point it's excessive and prejudicial.

THE COURT: How is it prejudicial if it's an accurate statement of the law?

MR. AVENATTI: Well, just merely because, your Honor, you've already reminded the jury at least, I think, five or six or seven times that my questions are not evidence and that I was acting as my own representative. You have not done the same as it relates to the government. Now, obviously they're counsel. I understand that.

THE COURT: Yes, and they didn't participate in any of the events, and they didn't reference themselves in any questions given.

All right. The objection is rejected. I would have included this in the instruction regarding self-representation,

which is actually where it appears in the standard instructions in most circuits, but I thought it made more sense to put it in this instruction, which reminds them what is and isn't evidence. So I think the fact that you represented yourself really raises the danger that that distinction is obscured, and it is critical to remind them of it.

Next.

MR. AVENATTI: Page 8, your Honor, line 20 and 21. You make the statement "any questions that I asked or instructions that I gave were intended only to clarify the presentation of evidence," and then the sentence continues.

There are key, there are a couple key moments during this trial where your Honor asked a question and there was an answer elicited in response to that or provided in response to that. I don't want the jury left with the impression that somehow that question and answer carries less weight than a question or answer involving either me or one of the government lawyers. I understand the Court doesn't want to give it any heightened importance; I don't want to give it any less importance. The testimony's the testimony.

THE COURT: All right. I think it is not an inaccurate statement of the law. I think they should understand that I'm not asking questions because I think that some point is particularly important. They should understand that I'm only doing that when I think the record needs to be

clarified.

Next.

MR. AVENATTI: Page 9, your Honor.

THE COURT: Yes.

MR. AVENATTI: I would ask that before line 22 the following be added: "If you find that a witness has lied as to any material fact, you are entitled to disregard that witness's entire testimony."

THE COURT: All right. I think that point is adequately conveyed in lines 17 to 21.

Next.

MR. AVENATTI: The Court's indulgence one moment, your Honor?

Page 10, after line 12, at the end of that, I'm requesting the following, from Sand, as it relates to witness credibility: "How much you choose to believe a witness may also be influenced by the witness's bias. Does the witness have a relationship with the government or the defendant that may affect how he or she testified? Does the witness have some incentive, loyalty, or motive that might cause him or her to shade the truth? Does the witness have some bias, prejudice, or hostility that may cause the witness to give you something other than a completely accurate account of the facts he or she testified to?"

THE COURT: Do you have any authority for the

proposition that it would be error not to include that, given what I do cover in my instruction on witness credibility?

MR. AVENATTI: Your Honor, I think that is a more robust and accurate statement of the law, and I'm asking that the request be given.

THE COURT: Mr. Rohrbach.

MR. ROHRBACH: The government's view is that your Honor's statement accurately states the law and captures the relevant point.

THE COURT: I agree, and you can certainly argue what you wish to the jury.

Next.

MR. AVENATTI: Immediately below that, your Honor, I'm requesting -- again from Sand -- the following instruction as to bias and hostility:

"In connection with your evaluation of the credibility of the witnesses, you should specifically consider evidence of resentment or anger that some government witnesses may have towards the defendant. Evidence that a witness is biased, prejudiced, or hostile toward the defendant requires you to view that witness's testimony with caution, to weigh it with care, and subject it to close and searching scrutiny."

And the further authority is *United States v. Masino*, 275 F.2d 129 (2d Cir. 1960).

Your Honor, this instruction is especially applicable

in this case due to the testimony of Ms. Daniels that was elicited on both direct and cross-examination, including her statements about wanting to see me raped in prison.

THE COURT: OK. Does *Masino* or any other authority suggest that it would be error not to include that language? Because again, it seems like my instruction provides an accurate and sufficient statement with respect to how they can evaluate credibility and leaves you ample room to argue the point you just made to the jury.

MR. AVENATTI: Again, your Honor, I think this instruction is a more -- well, it is more detailed and nuanced and applicable, especially in light of the testimony of Ms. Daniels. I don't believe the other instruction is adequate in light of the testimony.

THE COURT: OK. I disagree. You can argue it to the jury.

Next.

MR. AVENATTI: In connection with, I believe it was 352, we made the other request relating to evaluating the credibility of witnesses, etc. Your Honor's already dealt with it. I just wanted us to have a clean record that I'm requesting that.

THE COURT: I understand. It was 350. We did address it.

Next.

MR. AVENATTI: Page 11, lines 4 through 10, beginning with "although you may consider" and ending with "pretrial interview," I object to that inclusion in the instruction, your Honor.

No. 1, I don't think it is entirely accurate for the statements -- or for the reasons we previously stated during the trial.

THE COURT: You said No. 1. Is there a No. 2?

MR. AVENATTI: There is, your Honor. I'm trying to read a note here. I'm sorry.

The jury should be permitted, your Honor, to decide for themselves the importance or nonimportance of how many times witnesses met with the government, who was present, whether they thought they had liability, or the like.

THE COURT: All right. I agree, and that's why the last sentence says that. The sentences that you're pointing to are accurate, necessary to avoid any misimpression and confusion. So denied.

Next.

MR. AVENATTI: And just so we have an accurate record, as it relates to the sentence, "Additionally, as I told you during trial," your Honor, I think certainly witnesses have lawyers with them sometimes, but there's many, many witnesses that do not have lawyers with them. So I don't think it's accurate to say that it's not unusual. That suggests that it's

usual or more often than not.

THE COURT: Actually, it just says not uncommon, which is a brilliant lawyer's way of saying it happens. So it's an accurate statement. We'll leave it as is.

Next.

MR. AVENATTI: I was referring to line 9, just for the record, but I'm going to move on.

THE COURT: It says not unusual.

Next.

MR. AVENATTI: Page 12, line 15. The words "on the other hand," that transition, your Honor, is -- I don't know that it's contrary to the preceding sentence, so I think the sentence should just start with "the government."

And then at the end of that paragraph, line 18, I'm asking for the inclusion of the following sentence: "The testimony of a single witness may also be enough to convince you that reasonable doubt exists and the defendant is not guiltily."

THE COURT: All right. I'm not going to take the first change, but --

Well, let me ask the government. Any objection to the second?

MR. ROHRBACH: We think the Court's instruction is a correct statement of the law, but if the Court prefers, we don't object.

THE COURT: I'll throw Mr. Avenatti a bone and add that sentence: "The testimony of a single witness may also be enough to convince you that reasonable doubt exists." I'm going to change it slightly just to make, I think, the point actually clearer, "in which case you must find the defendant not guilty."

Any objection to that, Mr. Avenatti?

MR. AVENATTI: No, sir.

THE COURT: Next.

MR. AVENATTI: Page 13, after the "limited purpose evidence instruction," your Honor.

THE COURT: Yes.

MR. AVENATTI: I request that the Court instruct the jury as to what was meant by the Court admitting certain evidence or testimony over hearsay objections but not for the truth of the matter asserted.

THE COURT: No. I did that at the time, and the point of this is to remind them of those instructions.

Next.

MR. AVENATTI: Line 19, same page, the sentence that begins with "they are." I am requesting that it read, "They are not evidence and are no better than the testimony or the documents."

THE COURT: Mr. Rohrbach, I'll confess that I'm completely befuddled by the case law under Rule 1006, because

my understanding of the rule is that something that qualifies under the rule is evidence, which is why I draw the distinction here between things that were not in evidence and merely shown as aids and things that are in evidence. *Ho*, *Blackwood*, and *Miller* are the cases on which I relied to overrule the objection, but Government Exhibit 804 seemed to confuse the issue and suggest that an instruction should be given to the jury that it's not evidence. And for that reason, I did give them that instruction with respect to Government Exhibit 804, but it was a little bit intentioned with the instructions I gave the jury with respect to certain charts that were admitted earlier in the case.

I think that there is probably some imprecision -- I say this with all due respect -- on the Second Circuit's part because, again, I think my understanding is that a Rule 1006 chart or summary is technically evidence. But I've tried to sort of clarify things here. So I don't think it's accurate to say that they're not evidence.

Mr. Rohrbach.

(Continued on next page)

MR. ROHRBACH: Yes. We agree with your Honor completely, that this is a befuddling issue. We agree they are in evidence. They are evidence in the case. They are not independent evidence. So I think your Honor's instruction accurately captures the fact that they are not better than the testimony or documents on which they are based.

THE COURT: I agree. I will leave it as is.

Next, Mr. Avenatti.

MR. AVENATTI: Page 15, line 16.

The first sentence that reads, "You may not attach any significance to the fact that the defendant did not testify." I am requesting that that sentence be excised and replaced with the following: You may not hold it against the defendant in any way that he did not take the stand and testify. I am instructing you that it should not be discussed at all during your deliberations. And Mr. Dalack has some evidently background information to the Court if the Court is so inclined to hear from him.

THE COURT: All right. I will throw him a bone.

Mr. Dalack, do you wish to be heard?

MR. DALACK: Thanks, Judge.

We have encountered this issue in the trial that I had in October before Judge Stein that a juror had written to us after the trial disclosing that, despite Judge Stein's instructions, that the jury did discuss, had a pretty robust

discussion about the client's decision not to testify. We put it before Judge Stein in a posttrial motion, and he I think determined that, because we couldn't point to any sort of consideration of external information or evidence, that it was improper for him to further probe the jury deliberations.

But that being the case, we are concerned that, given the sort of widely publicized, or I guess widely publicized instances of defendants in other high-profile cases taking the stand that we want to guard against any possibility that the jury would consider or mention in their deliberations Mr. Avenatti's decision not to testify. So we think that a stronger admonishment from the Court is appropriate.

THE COURT: Okay. I am a little puzzled because I just read the rest of the paragraph and it seems to say pretty much exactly that, ending "you may not consider this in any way in your deliberations in the jury room."

MR. DALACK: Can I take a look at the proposed charge again, your Honor?

THE COURT: Sure.

MR. DALACK: Thanks.

THE COURT: Sure, page 15, line 18.

In the meantime, let's continue on.

Next, Mr. Avenatti?

MR. AVENATTI: Your Honor, page 18, line 20, through page 19, line 2. I object to the inclusion of this instruction

for the same reasons outlined in my submission at Docket 352.

THE COURT: Okay. Next?

MR. AVENATTI: Assuming that the Court overrules that objection.

THE COURT: Sorry. Let me be unambiguous about it. I overrule that objection.

Next?

MR. AVENATTI: I am standing on the prior objection, but in the alternative in the light of Court's ruling, I am asking for the inclusion of following words on page 18, line 21: Before the word "defendant" beginning at the line, "knew of such information" and "defendant was under."

THE COURT: Isn't that point made with the second item, that the defendant actually knew such disclosure was required? It seems to me that one can't know what disclosure is required if one doesn't know that one has information.

MR. AVENATTI: Your Honor, I think somebody could know that a disclosure was required, but didn't necessarily know of the information. It's ambiguous, your Honor, and it is --

THE COURT: I don't think it's ambiguous.

Next?

MR. AVENATTI: Page 20, line 22, through page 21, line 4. We are requesting a standalone good faith instruction, your Honor, as opposed to having the good faith instruction buried one the second element.

THE COURT: All right. Can you cite any authority for the proposition that as long as it is covered in the charge that standalone instruction is required?

MR. AVENATTI: Your Honor, I don't have any authority for that exact proposition, but it is obviously a critical issue in the case, and I see no harm in setting it off on its own. Again, it emphasizes the importance of the good faith instruction, and it's critical to the defense.

THE COURT: All right. I think I am inclined to leave it as it is.

Mr. Rohrbach?

MR. ROHRBACH: Yes, your Honor. We agree it is a limitation on this element, so including it inside this element makes sense.

Given the expected defense closing, there's little right that this will not be noticed by the jury.

THE COURT: If Mr. Avenatti had testified and put his subjective belief before the jury in a more substantial way, then it may well be that a separate discussion would be warranted, but really it's relevant only in reference to the government's burden with respect to the second element.

So I think it makes sense to include it in the second element. Mr. Avenatti, let me ask you to just look at the redline for a moment and ask if you have any objection. This is where I propose to include your defense theory of the case.

I recognize that you are standing on your request for the request that you made at Docket No. 350, but I'm not going to give that instruction. This is the one that I propose to include.

Any objection to this?

MR. AVENATTI: One moment, your Honor. I'm sorry.

MR. DALACK: Your Honor, if I may, while Mr. Avenatti is dealing with that other point, on the failure to testify point?

THE COURT: All right.

MR. DALACK: Thanks.

THE COURT: We are in tag team mode. Go ahead.

MR. DALACK: Sorry. I will shut up after this.

But your Honor's point is well taken with respect to the language that the Court proposes. I think that we have a very intelligent jury, but sometimes I fear that use of the terms "adverse inference" or "you may not consider" don't always drive the point home. So we would just propose that the Court just be completely sort of clear and concrete and say that, you know, you may not hold it against the defendant in any way that he did not take the stand. Pardon the double negative. I am instructing you not to discuss it at all during your deliberations.

THE COURT: All right. If all I said is "no adverse inference," I would be inclined to agree, but "you may not

attach any significance to the fact and you may not consider this in any way" certainly don't seem like complicated concepts or language to me. So I will leave it as is.

MR. DALACK: Okay.

THE COURT: Thank you.

Mr. Avenatti, back to you.

MR. AVENATTI: Yes, your Honor.

Going back to the redline, line 20, I understand that the Court is declining to instruct on the defense theory of the case as submitted. But I would request that the theory of the case, at least as it relates to everything on the first page as submitted and then the last paragraph, "at all times Mr. Avenatti acted" --

THE COURT: I don't know what document you are looking at.

MR. AVENATTI: I am looking at the theory of the case. I'm sorry.

THE COURT: Not docket 350? A different document? You don't seem to have 350 in your hand.

MR. AVENATTI: It is 350, your Honor. I have a different version of it.

THE COURT: Okay. So telling me what is on the first page if you have a different version doesn't really help me.

MR. AVENATTI: Fair enough, your Honor. You're right.

THE COURT: Okay.

MR. AVENATTI: So what I am requesting is, in light of your Honor's decision not to include the theory of the case as submitted, is that your Honor instructs beginning with "the defense contends" all the way down to "had advised him." In light of your Honor's comments, the "any subsequent payment" paragraph all the way down to "paying these fees and costs," not be included.

And then the last statement be included, beginning with "at all times," down to "harm to Ms. Daniels."

MR. ROHRBACH: Your Honor, though we disagree with defendant's proposal, because the defendant doesn't get to import his closing into the instructions, we do agree that, to the extent the defense wants to make clear that there is an instruction of the defense's contention, we don't object to the Court's instruction beginning with the words like "the defense contends" that or "the defense theory of the case is," something like that.

THE COURT: Okay. So I certainly understand, in light of *Durham* and *Dove* that if it is an accurate statement of the law there is a basis in the record to make an argument that the defense may be entitled to a defense theory of the case or may be entitled for the defense theory of the case to be included in the instructions.

It seems to me that I don't know if -- I don't think anything in the law requires that I use the phrase "the defense

theory of the case is," so long as the theory is present. I guess my inclination is to leave it as I have proposed it, because it gives a succinct encapsulation of what the defense theory is. Then Mr. Avenatti can marshal the evidence in support of that theory in his closing. That's what a closing is for. I really don't think I should be marshaling the evidence for either side in my jury instructions.

Thoughts?

MR. ROHRBACH: Your Honor, I don't think it would be error do it the way the Court proposes. We just want to be sure that the record is clear that the Court is giving a defense theory instruction. So we want it to be clear that the government has no objection if the Court and the defense wants to use the magic words "the defense theory" or "the defense contends."

THE COURT: Mr. Avenatti?

MR. AVENATTI: Your Honor, I object because the proposed theory of the case is not a complete theory of the case. It is certainly not as complete as what I have proposed and then subsequently proposed even in light of the Court's comments.

But the redline at 17 through 20 is not an adequate statement of the defense theory of the case. That is why I then proposed the alternative.

THE COURT: Let me ask the government the following:

I think until now we have focused really almost exclusively on Count One. The problem with including -- what I proposed is buried in the instruction with respect to Count One, and obviously Count Two is contingent on Count One and in that sense it would provide a defense as to Count Two as well.

But Mr. Avenatti is proposing sort of a different theory with respect to Count Two, namely, that he had authorization. So I guess, I am thinking out loud, but wondering if maybe it does make more sense to have a standalone defense theory of the case instruction and to have it come after Count One and Count Two. I think what we would do, if everyone is in agreement on that or if I decide that, is I would probably go back to chambers and try to come up with one that I think accurately reflects the record and the law and docket it and let you guys have at it.

Your thoughts?

MR. ROHRBACH: That does seem to make sense, given that the defendant does seem to have a slightly different theory as to Count Two.

THE COURT: Anything you wish to say with respect to that theory on Count Two? Obviously, I assume you think it's wrong, but --

MR. ROHRBACH: Yes. Yes, your Honor.

All we would say, your Honor, and I don't think it would require a significant revision to the Court's instruction

to add a sentence expressing that view and that we don't think there's a need to, you know, have an extensive discussion. It's just that he believes he had authority to use the information, which can be captured succinctly.

THE COURT: I think I will take it under advisement, try to docket something later this afternoon, and give you a very short amount of time to respond to it and then give you a final ruling later this evening.

So I'll take that one under advisement. All right.

MR. AVENATTI: As it relates to the order, your Honor, I would ask that it go before the two counts.

THE COURT: Okay. Well, that makes no sense, because the jury won't understand what the counts are. It doesn't make sense to give them the theory of your defense before explaining what the charges are, so definitely no.

One option would be to give your theory as to Count One after the instructions for Count One and your theory as to Count Two after the instructions for Count Two, but I will ponder, particularly since the two counts are connected as well. So it may make more sense to do it just once.

Next, Mr. Avenatti?

MR. AVENATTI: Page 21, line 11. I am proposing the first sentence read, "Direct proof of knowledge and fraudulent intent is not required." And then eliminate the next two sentences.

THE COURT: All right. Denied.

Next?

MR. AVENATTI: Again, your Honor, I reiterate my objections relating to the instructions concerning professional duties beginning on page 22 of the instructions.

THE COURT: All right. So you have preserved for the record your objection to the inclusion of instructions on professional duties.

MR. AVENATTI: Okay.

THE COURT: That has been overruled. What I deferred until now is any specific objection. So if you have any specific objections, I'm happy to hear them.

MR. AVENATTI: My first additional objection relating to this section is my objection to this discussion concerning professional duties occurring at this particular place in the instructions, before the third and final element of wire fraud.

I believe all the elements should be instructed on together, and if the instructions are going to be given relating to professional duties, they should not be dropped into the middle of the instructions about, or on the elements of wire fraud.

THE COURT: Okay. I disagree. Since it pertains to the first and second elements, I think it makes sense to pause and include this.

Next?

MR. AVENATTI: The bottom of page 22, line 21 through 23, I cannot state for the record how strongly I object to this language. It is commentary. It is unnecessary. It's highly prejudicial. It appears to seek to provide the jury with the Court's view of the case and the allegations in the case and the seriousness of the allegations. For that reason, I'm asking that it be precluded or excluded from the instruction. I think it is clear error to include this language in these instructions.

THE COURT: Okay. I assume you don't dispute that it is an accurate statement of the law since it is more or less a directed quote from *McKnight*, which appears on the bottom of page 23. I assume you agree it is a correct statement of the law?

MR. AVENATTI: Your Honor, I believe that it may sometimes be a correct statement of the law. First of all -- and I think that this lends credence to my argument -- *McKnight v. State Bar* is a state bar case. It is a disciplinary matter.

THE COURT: Mr. Avenatti, we are not rearguing the propriety of including instructions on professional duties. These instructions are a summary of ethical duties of a lawyer. So if you concede that it is an accurate statement of California law with respect to the ethical obligations of a lawyer, I think you're conceding that it is an accurate statement of the law.

MR. AVENATTI: For the record, your Honor, I am not conceding that. As a general proposition relating to these instructions, and as set forth in my submission at 352, if the Court is going to be instructing on the duties, the Court should instruct using the language of the actual bar rule in effect at the time and nothing more.

THE COURT: Mr. Rohrbach?

MR. ROHRBACH: I guess I want to be careful if what Mr. Avenatti is saying that the bar rule has changed in some way that makes these an inaccurate statement of the law. Otherwise, the government's view is that it is clearer and a better aid to the jury and in fact more accurate for the Court to give these instructions rather than simply handing the bar rules to the jury and asking them to decipher them, the same way the Court gives instructions on wire fraud rather than simply handing the jury 18 U.S.C. 1343.

MR. AVENATTI: I want to make one other point for the record. The first sentence on 22, line 21, reads: "The misappropriation of client funds has long been viewed as a particularly serious ethical violation for a lawyer."

Again, this case deals with -- meaning the case that the Court is relying on, *McKnight* -- it deals with ethical violations, not the violation of federal criminal statutes. And this inclusion at the bottom of 22 further transforms this case into whether I violated a bar rule. It is highly

prejudicial.

THE COURT: All right. So I think Mr. Avenatti's objection is sort of conflating two issues. One is the relevance of instructions with respect to professional duties at all, and we've already discussed that ad nauseam. I am not going to revisit it. I disagree.

Having said that, and notwithstanding the fact that this is a direct quotation from a California Supreme Court case, I think I am inclined to tone it down a little bit, just lest, you know, the jury see it as my commentary, as editorial commentary.

So what I would propose is striking the second sentence beginning at "breaches" and moving the first sentence to the end of the first paragraph and simply saying the misappropriation of client funds is a particularly serious violation of a lawyer's ethical duty of loyalty.

Mr. Rohrbach, any objection to that?

MR. ROHRBACH: No objection.

THE COURT: Mr. Avenatti, recognizing that you're preserving the objections you've already made, any objections to that particular change?

MR. AVENATTI: Yes, your Honor. It's still objectionable. It's still highly prejudicial. It is irrelevant and it presupposes that there is a misappropriation, which is what --

THE COURT: It doesn't. That's the jury's province to find whether there is or there isn't.

MR. AVENATTI: I believe the inclusion of that would still constitute serious error, your Honor.

THE COURT: Okay. You have preserved that argument for the record.

Next?

MR. AVENATTI: Page 23, line 2 through 3. "A lawyer cannot act without the client's authorization and a lawyer may not take over decision making for a client unless the client has authorized the lawyer to do so." I object to the inclusion of that sentence, your Honor. It is not an accurate statement of the law, nor is it an accurate statement as to the authority of an attorney.

THE COURT: As to the authority what?

MR. AVENATTI: As to the authority of an attorney. So I have a current proposal.

California Rule 1.2 provides that "a lawyer shall abide by a client's decisions concerning the objectives of the representation and shall reasonably consult with the client as to the means by which they are to be pursued. Subject to rules on confidentiality, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. This means that a lawyer begins with broad authority to make choices advancing the client's objectives.

That broad authority may be limited by an agreement between the lawyer and the client or by the client's instructions. In the absence of an agreement or instruction, however, a lawyer has the authority to take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client."

And the support for that proposed instruction your Honor is California Rule of Professional Conduct 1.2, Restatement of the Law Third, the law governing lawyers, Sections 21, 22, at pages 175 and 181 of the American Law Institute Edition; *Williams v. Saunders*, 1997 case, 64 Cal. Rptr. 2d 571, as well as California Code of Civil Procedure 664.6.

THE COURT: And what do you think is wrong in what I have written, that comes in part from Rule 1.2?

MR. AVENATTI: What you have written states a lawyer cannot act without the client's authorization, which suggests that the client has to authorize every action of the lawyer.

THE COURT: Well, but then the next paragraph it says, "A lawyer he may take such action on behalf of the client as is impliedly authorized to carry out the representation." And the paragraph after that, "The lawyer is authorized to act independently on behalf of the client in making routine or tactical decisions."

In other words, I think the instruction as a whole

makes clear that the lawyer can take actions on behalf of a client, but ultimately I assume you agree that the lawyer is bound by the client's authorization, though some of it can be implied from the fact of representation in and of itself.

MR. AVENATTI: Again, your Honor, I am making a request for the instruction that I made because I think it is clearer and a more fulsome statement of the law.

THE COURT: Okay. I don't think you've submitted that, filed that on the docket, that request, is that correct?

MR. AVENATTI: I have not, but I will be happy to do so.

THE COURT: All right. So why don't you file it. The point of pretrial requests to charge is precisely to give me an opportunity to consider these things in the fullness of time. So it is a little hard for me to ponder that one on the fly. If you file it after this conference, I will take it under advisement, but I think that the concepts that you described are covered in my instruction and for that reason I don't think it's error. But I will certainly give it consideration if you file it. Go ahead.

MR. AVENATTI: Same page, 23, line 12 through 13.

The parenthetical "(such" down to "itself." I'm requesting that be excised, as it's irrelevant to this case.

THE COURT: I don't. I disagree that it is irrelevant. My concern was just the use of the term

"substantial rights" is not self-defining, and I wanted to give the jury some sense of what that meant. So I think it is just as an example. I don't think there's anything prejudicial about it, and I certainly think they do qualify. So I will leave it unless you -- I will leave it.

Next? For the record that also comes directly from *Blanton v. Womancare Inc.*, 696 P.2d 645 (1985).

MR. AVENATTI: As a general proposition, your Honor, I will note for the record that a number of these statements appear to come from the California Rules of Professional Conduct, which were adopted I think in late 2018 or early 2019. There were different rules that governed the conduct of lawyers in California before these rules were adopted. I am not certain as I sit here today as to whether there is any changes between the two sets of rules, but to the extent there are, I object.

THE COURT: Mr. Avenatti, you can't just raise a general objection and expect that to be preservation of any argument on appeal. If you can identify something -- first of all, your proposal was that if I include these at all I simply quote the rules. Now you are telling me that those rules might not have been in effect at the relevant time. So, once again some inconsistency in the arguments you are making to me. Number two, you can't simply say I object to the extent that these are inconsistent with the law. You need to make an

specific identified objection and tell me how it's inconsistent with the law. If you do that and you persuade me, I'm happy to make a change. But I am not going to simply say -- you can't preserve an objection by saying, I object to the extent that you're wrong. That's not the way this works.

Next?

MR. AVENATTI: I understand the Court's position, your Honor. Just for the record, I said quote the language of the rule --

THE COURT: Mr. Avenatti, you had months of opportunity to propose charges on these issues. You had an opportunity once I ruled on your motion to preclude the government from calling experts to propose instructions on these issues. You had an opportunity during trial to propose instructions on these issues. To date, other than orally doing it a moment ago, you haven't presented me with any instructions on these issues. I have done my best with a combination of the government's charge, Judge Gardephe's charge, and my own research and my law clerks' research into California law.

If you can identify something that is wrong, I am happy to make a change and make sure it is accurate. But you can't simply raise a general objection and expect that I can make a change.

You have made your record. If the Court of appeals disagrees with me and thinks that that's preserving the issue

if you're convicted, then so be it. But in my opinion that's not how this process and system work.

Next?

MR. AVENATTI: Page 24, lines 12 to 14. I ask that that be excised, as I don't believe that it is an adequate statement of the law. A lawyer does not owe a client a duty of disclosure of all relevant information.

THE COURT: All right. I am going to strike the last sentence of that instruction. I think the point is adequately covered earlier and arguably differently. So, to avoid any confusion, I will strike that last sentence. I certainly do think it requires a definition of "reasonably," and I think that is an accurate definition.

Next?

MR. AVENATTI: Page 25, your Honor, lines 3 through 5.

I am asking that that be excluded, as I don't know that that is a complete and accurate statement of the law.

THE COURT: All right. Can you tell me what is not complete or inaccurate about it.

My law clerk is pulling the language, but I think this comes from Section 6148 itself, which you have relied on repeatedly in this proceeding.

MR. AVENATTI: Can I come back to that momentarily, your Honor?

THE COURT: Sure.

MR. AVENATTI: Okay.

THE COURT: For the record, when you look at it, it's subsection (b) of 6148, which I think requires a lot more than this would suggest, but I think this probably is enough.

MR. AVENATTI: Page 26, lines 1 through 5.

Two statements about this, your Honor.

First of all, this is irrelevant to this case, this language, at least as the case has been described by your Honor.

And then, second, I will note the following: "If the lawyer becomes entitled to funds in the client trust account, the client must" -- I'm sorry -- "the lawyer must withdraw the funds at the earliest reasonable time."

There is no obligation under California law to get signoff from a client, your Honor, under those circumstances. As soon as the lawyer reasonably believes he is entitled to the money, he can withdraw it from the trust account. In fact, he's obligated to do so.

THE COURT: A couple of problems with your argument:

Number one, it seems to me that this paragraph is spot on for this case and totally appropriate to include. Any suggestion that it is irrelevant borders on preposterous.

Number two, this comes almost directly out of the language of Rule 1.15. Section (c) provides that "funds belonging to the lawyer or the law firm shall not be deposited

or otherwise commingled with funds held in a trust account except:"

And then subsection (2) of that section says, "funds belonging in part to a client or other person and in part presently or potentially to the lawyer or the law firm, in which case the portion belonging to the lawyer or law firm must be withdrawn at the earliest reasonable time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved."

That seems to -- which is to say that my language seems to come straight from the rule.

What am I missing?

MR. AVENATTI: Your Honor, where is the evidence that I deposited or otherwise commingled funds belonging to me or my law firm?

THE COURT: Mr. Avenatti, I am not telling the jury anything about the evidence. I am telling the jury the principles of law that they can consider in considering the evidence. It is up to you and government to make arguments about the evidence, and it is up to the jury and only the jury to make findings about the evidence.

MR. AVENATTI: In order for this instruction to be relevant, there has to be some factual basis for the situation

described by way in the paragraph.

THE COURT: And there is. But I am not speaking to that, and I am not commenting on that. I am simply giving them a statement of the law. If you can demonstrate to me that it is an inaccurate statement of the law, I will certainly take that under advisement, but nothing you have said suggests that.

Am I missing something?

Anything further you want to say on that?

MR. AVENATTI: There is nothing further I want to put on the record, your Honor.

THE COURT: Okay. Next?

MR. AVENATTI: With the Court's indulgence, your Honor, one moment, please.

Your Honor, at the conclusion of the professional rules section, I am asking --

THE COURT: This is in the redline or in the clean version, because the conclusion is different in the redline?

MR. AVENATTI: Your Honor, the proposed instruction on 26, again I've already preserved my objections in general to this, but in light of your Honor's prior rulings I believe that this proposed instruction should be broader in that it should say, "without more" -- I am on line 9 of the redline -- "mean that he is guilty of any crime."

The next sentence: "that is, a lawyer can violate his ethical duties under California law without having the intent

required to commit a crime."

That is fine.

The balance of the proposed instruction is fine, subject of course to my objections previously stated.

THE COURT: All right. So I think the only suggestion you had there was changing the word "wire fraud" to "any crime."

Is that correct?

MR. AVENATTI: Yes, your Honor.

THE COURT: I will make that change.

Going back to the clean version, what's next?

MR. AVENATTI: No further objection, your Honor.

THE COURT: All right.

MR. AVENATTI: Oh, actually I spoke too soon. I have one, your Honor. I'm sorry.

Your Honor, I'm sorry. I am just trying to find one piece of paper. I have one proposed instruction that I'm requesting. I'm sorry.

I found it.

Your Honor, I am requesting the following jury instruction relating to written fee agreements.

In California the absence of a signed written fee agreement between a lawyer and client does not subject a lawyer to discipline, nor does it mean that the lawyer cannot be paid for his or her services. Even in the absence of a written fee

agreement, a lawyer is still entitled to reasonable fees for his legal work performed on behalf of a client. And I am relying on 6148(c), *Matter of Harney,* 3 Cal. State Bar Ct. Rptr., 266, 280 (1995); WL 170223 *7 (1995). And then *Leighton v. Forster* (2017) 213 Cal.Rptr. 3d 899.

THE COURT: All right. I mean, my inclination is to think that that is precisely what I already have in my instruction to the jury about contracts and the ability to recover a reasonable fee in the absence of a contract.

Having said that, I think there's one point in what you just recited that might be well taken, which is in my instruction -- and I am now looking at the redline, this is page 27, lines 4 and 5 -- it states that in certain circumstances a lawyer may be able to recover the reasonable value of his or her legal services rendered to a client even if the fee agreement is found to be invalid or unenforceable.

Perhaps let me float the suggestion of adding the following, "Rendered to a client in the absence of a fee agreement or if a fee agreement is found to be invalid or unenforceable." I am not sure it's necessary in this case since there's no ambiguity. There was a fee agreement, but I suppose it doesn't hurt.

Mr. Rohrbach?

MR. ROHRBACH: We have no objection to that change.

THE COURT: Mr. Avenatti?

MR. AVENATTI: Well, I would like my change made, but secondarily I'll certainly take that change, your Honor.

Thank you.

THE COURT: All right. So I will make that change.

Just for clarity, Mr. Avenatti, first of all, you said you might want to circle back momentarily on the written fee agreement language on page 25 that I said came from 6148. I just wanted to make sure you didn't have anything further to say on that.

MR. AVENATTI: Nothing further, your Honor.

THE COURT: Okay. I think we've covered all the redline changes in the redline pages, but any objections to any of those redline items?

MR. ROHRBACH: Not from the government.

THE COURT: I'm sorry. From Mr. Avenatti.

MR. AVENATTI: Nothing beyond what I have already said.

THE COURT: Okay. And then, just to be absolutely clear about it, I don't believe you made any objections or suggestions with respect to page 28 and beyond or to the verdict form. I just want to make sure and absolutely unambiguous that you have no objections or suggestions to any of that. Is that correct, Mr. Avenatti?

MR. AVENATTI: Page 28, my understanding was the only change was a citation change at the bottom. Am I right about

that or wrong about that?

THE COURT: Sorry. I was back on the clean version. Sorry for the confusion.

So from page 28 in the clean version I understand that you are making no objections or suggestions beyond whatever we've already addressed?

MR. AVENATTI: That is correct.

THE COURT: All right.

Let me circle back to the government. Did you have any alternative suggestions on additional language with respect to the -- I'm going to refer to it as the quantum meruit concept for lack of an easier way to describe it, but I want to reiterate that I don't expect to hear those words tomorrow.

MR. PODOLSKY: So, first, as I mentioned earlier, I think we do oppose this paragraph, but as far as the additional language, I was trying to write quickly, your Honor. I think you had a fairly good suggestion. I am not sure I captured it all, but I think the concept that we had in mind is something to the effect of, of course, your task --

THE COURT: Let me make a different proposal.

MR. PODOLSKY: Sure.

THE COURT: Mr. Avenatti is going to submit something on the California professional responsibilities front. I have the task of trying to come up with a theory of defense instruction for you to consider. How about I give you some

homework and you make whatever suggestion you want in writing and with more consideration than you have been able to do here.

MR. PODOLSKY: I think it's fair for each of us to have one assignment tonight. So we will happily do that. Just so we know, are you taking under advisement the continued inclusion of the addition on lines 8 to 15 of page 27?

THE COURT: Yes.

MR. PODOLSKY: Okay.

THE COURT: I understand your view is that that should be omitted, and I will consider that. My plan is to await your submissions. It is now almost 4 o'clock. Can you both get me your submissions by 5 o'clock? Is that reasonable?

MR. PODOLSKY: Yes, for the government.

MR. AVENATTI: Your Honor, I would like until 5:30 if possible. I'm happy to do it by 5. No problem, your Honor.

Just for the record, I object to the excising of the language on 8 through 15 that the government has requested be removed for the reasons I've already stated.

THE COURT: I understand.

Okay. So good. I'll get your proposals by 5.

Just to be clear, Mr. Avenatti, it's just the one that you read to me, and I just want that with the sources for it so I can consider that.

In the meantime, I'll make the changes that I have accepted and also take a stab at a defense theory of the case

at some point later this evening after I get your changes. I think what I will likely do is docket a revised and presumptively final version of the charge and give you an opportunity on relatively short turnaround to make any objections or suggestions in writing on that so that we're good to go tomorrow.

Any questions?

MR. PODOLSKY: Just one point.

There are references here to the indictment. I think we had raised this earlier. I don't think the government has strong feelings about whether we send back a version of the indictment or not, but we want to be prepared if we should.

THE COURT: You are not going to.

MR. PODOLSKY: Okay.

THE COURT: All right.

Anything else from you, Mr. Avenatti?

MR. AVENATTI: Yes, I had a question, your Honor.

THE COURT: Okay.

MR. AVENATTI: I had intended on referring to the Court's instructions during my closing argument, including by displaying portions of them to the jury in a PowerPoint presentation.

I want to make sure that there's no objection to that, provided that obviously they are the exact language of the instructions. I've never had an issue in any of the other

trials before, but I don't want to run afoul of your Honor tomorrow or at any other time by the way.

THE COURT: I understand. I appreciate your asking. I will say that I have had trials where lawyers have done that without asking and it has sort of irked me, so perhaps I should have raised the issue myself, but thank you for asking.

I mean, I guess my initial reaction is I don't have any objection with the understanding that I will advise the jury and may interrupt you to advise the jury if appropriate that they are to listen to my instructions, and it's my instructions that govern.

But, that being said, to the extent that either side intends to make reference to my instructions, I do think there is an argument to be made that the closer they adhere to my instructions the better, and no better way to do that than to actually show my instructions on the screen.

So I guess my thought is fine.

Mr. Podolsky?

MR. PODOLSKY: That's fine, your Honor. As long as it's couched as far as what the defendant expects and not what he's instructing, we have no objection to that.

MR. AVENATTI: I don't think there's anyone here that will ever think I am going to be instructing the jury, your Honor.

THE COURT: I don't disagree with that statement,

Mr. Avenatti. That's fine. But more to the point, as is appropriate, you should couch any reference to my instructions with something to the effect of you expect that the judge will tell you X.

MR. AVENATTI: Of course.

THE COURT: With that understanding, no objection if you want to show on the screen mine.

All right. There's one thing that I said we would circle back to, which is whether Mr. Avenatti should be required to refer to himself in the third person. I don't know if the government wishes to be heard on that or has a view. I think you said you were going to defer to me on it.

MR. PODOLSKY: We were able to consult briefly with appeals, your Honor. We don't have any authority that would suggest it would be -- we are not aware of any reason your Honor can't do it. We would also be comfortable, however, if the defendant referred to himself in the first person so long as he couched all of it as the evidence showed or in reference to the evidence, to avoid the appearance that he is testifying.

MR. AVENATTI: That would be my preference, your Honor. I am confident that if I run afoul at any point in time I will pay a price.

THE COURT: All right. Well, let me be clear about what that price may be. If you run afoul of that and I feel that you are crossing the line into testifying in front of the

jury, number one, I will not hesitate to give a curative instruction and make sure there is no ambiguity or confusion. Number two, I may require you from that point forward to refer to yourself in the third person. So consider it a sort of looming possibility if you don't draw the appropriate line even using the first person pronoun.

Do you understand that?

MR. AVENATTI: I do. Let me give you an example, because I want to make sure that is all ironed out now.

Would the following statement be acceptable: The evidence shows that on February 27, 2018, or thereabouts, Ms. Daniels and I entered into this contract. And GX 3 goes up on the screen. I am assuming there's nothing wrong with that.

THE COURT: I think that is an unobjectionable statement, particularly because it makes reference to the evidence and what it shows.

MR. AVENATTI: Okay.

THE COURT: Yes.

MR. AVENATTI: All right. As opposed to, I believed I was entitled to the money.

THE COURT: Yes. I would say, although I don't think the proposition is disputed, I don't think you should say on February 27, 2018, I entered into a contract with Ms. Daniels, because it obscures the distinction between the testimony they have heard and the evidence that is in the case and your

closing.

MR. AVENATTI: I could put up the exhibit and say, This document shows on February 27 --

THE COURT: Correct.

MR. AVENATTI: -- Ms. Daniels and I entered into this agreement.

THE COURT: Correct.

MR. AVENATTI: Okay.

THE COURT: But I would err on the side of making reference to the evidence showing this, the evidence showing that, the government exhibit shows this, the testimony revealed that.

MR. AVENATTI: I had no intention of doing the other, but I am glad we clarified this.

THE COURT: Good. As am I.

All right. I want to share one strange development during this conference, because I honestly don't know what to make of it and -- well, I don't know what to make of it. I don't know if it pertains to this case at all.

At some point during this conference somebody apparently approached one of my law clerks who was sitting in the back saying that they were from the jury department and asked what time we were getting started with the jurors tomorrow. It was not a name that anyone on my staff recognized, so we asked for her business card, and she provided

a business card with a name that I won't put on the record but identifying her as a supervising jury clerk from the New York County Jury Division, *i.e.*, the state court across the street.

That is all I know. I don't know who the person was, what interest or possible business they have in inquiring about it, but it certainly is an odd turn, and I thought I would share it so you know what I know.

Anything you wish to say?

MR. PODOLSKY: No. Thank you, your Honor.

THE COURT: If you would like a copy of the photograph of the business card, I'm happy to provide it to both sides. I am not going to make it part of the public record since I don't know who this person is or if it even was the person whose name appears on the business card.

Mr. Avenatti?

MR. AVENATTI: I am assuming we are going to show up here as opposed to across the street tomorrow, your Honor.

THE COURT: You will not be in state court tomorrow. Yes.

MR. AVENATTI: If I am, I'm in trouble. I get it.

THE COURT: Hang on one quick second. Let me just check something.

MR. AVENATTI: Michael Avenatti will be in state court, but I will be here.

THE COURT: All right. Thank you, all, for taking

time to work through these things. We all have some homework to do. I want to make sure you can comply with the 5 p.m. deadline, so you are excused. I will see you tomorrow morning no later than 9:00, and I expect that we will start with the jury even before 9:15.

So see you in the morning.

(Adjourned to February 2, 2022 at 9:00 a.m.)